(2) Supreme Court, U.S.
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In The

Supreme Court of the United States

FEDERAL WAY SCHOOL DISTRICT,

Petitioner,

v.

M.L., a minor, and C.D. and S.L., his parents,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

M.L., a minor; C.D., his parent; S.L., his parent,

Petitioners-Appellants,

v.

FEDERAL WAY SCHOOL DISTRICT; WASHINGTON SUPERINTENDENT OF PUBLIC INSTRUCTION,

Respondents-Appellees.

No. 02-35547

D.C. No. CV-01-00899-JCC

ORDER AMENDING OPINION AND DENYING PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC AND AMENDED OPINION

Appeal from the United States District Court
for the Western District of Washington
John C. Coughenour, Chief Judge, Presiding

Argued and Submitted
August 7, 2003.

Filed November 5, 2004
Amended January 14, 2005

Before: Arthur L. Alarcón, Ronald M. Gould, and Richard R. Clifton, Circuit Judges.

Opinion by Judge Alarcón;
Concurrence by Judge Gould;
Dissent by Judge Clifton

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ORDER

This court's opinion, filed November 5, 2004, is amended as follows:

Insert footnote 9 to Section II slip op. at 15673, 387 F.3d at 1116, after the words "at least one regular education teacher."

The new footnote 9 reads as follows:

> Although I would apply the structural error analysis outlined above, I recognize that a majority of the panel has adopted a harmless error test instead. How harmless error review is to be conducted is therefore squarely presented. Therefore, I believe I should address the issue so that future panels confronted with it will have an expression of each of our views on this question.
>
> I cannot agree with Judge Clifton's analysis because he relies on the ALJ's and the district court's findings that the placement made by the procedurally defective IEP team was, nevertheless, harmless because it was the best placement for M.L. *See infra* at 15693-94 (Clifton, J. dissenting). This approach rewards procedural noncompliance and is at odds with the Supreme Court's holding that the IDEA seeks to achieve its substantive ends largely through procedural means:
>
> > *[T]he importance Congress attached to [the Act's] procedural safeguards cannot*

> *be gainsaid.* . . . We think that the congressional emphasis upon full participation of concerned parties throughout the development of the IEP . . . demonstrates the legislative conviction that *adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.*

Rowley, 458 U.S. at 205-06 (emphasis added).

Judge Clifton recognizes that *Rowley* mandates a two-step analysis. *See infra* at 15694 (Clifton, J., dissenting). Nevertheless, he appears to have jumped to the substantive second step to resolve the procedural first step, effectively circumventing the two-step process.

Even under the harmless error standard of review adopted by the majority, it is my view that loss of an educational opportunity cannot be determined by considering the merits of the placement identified in the IEP. Instead, it must be determined by whether the failure to include at least one regular education teacher, as expressly mandated by Congress, had a material and inherently harmful impact on the ability of the defective IEP team to develop a program that was reasonably calculated to enable M.L. to receive educational benefits. Thus, I believe the school district's procedural error was not harmless.

At slip op. 15689, 387 F.3d at 1124 n.1, modify the footnote by adding the following sentence after the first three sentences of the footnote following the words "and the conclusion" such that the footnote reads:

> To be precise, while I agree with the main point of Section II-C, which is that the school district violated the procedural requirements of the IDEA, I do not join in the last sentence of that section. In that sentence Judge Alarcón applies the "structural defect" analysis contained in Section II-B of his opinion to reach the conclusion that the district court's judgment must be reversed. I disagree with both the structural defect approach and the conclusion. Nor do I join in the footnote accompanying that sentence.

Insert a new footnote 3 (renumber subsequent footnotes accordingly) at slip op. 15695, 387 F.3d at 1127, at the end of the sentence "That being so, the district court properly held that even if there had been error in the composition of the IEP team, M.L. had not been denied a free, appropriate education."

The new footnote 3 reads as follows:

> Judge Alarcón takes issue with my reliance on the district court's finding, not because he challenges the finding itself, but because he disagrees with my reliance upon that finding to conclude that the procedural error here was harmless. He criticizes my approach as being "at odds with" the two-step inquiry set forth in Supreme Court's decision in *Rowley* (and quoted in the text above), arguing that I have jumped to the substantive second step in order to circumvent the procedural first step. *Ante* at ___ n.9. I respectfully disagree. I give the same answer to the first *Rowley* question as both of my colleagues do: no, the school district has not complied with the procedures set forth in the Act. But *Rowley* does not say what happens when the answer to the first question is "no." Our

court has previously held, and a majority of this panel holds again here, that a procedural error violates the Act only when it results in a lost educational opportunity for the child. There is nothing in *Rowley* which precludes consideration of the substantive impact on the child in determining whether there has been a lost educational opportunity due to a procedural error. Nor does my approach involve the second *Rowley* question. Instead, the district court applied what I describe above as a "tougher substantive standard." The second question under *Rowley* asks only whether the program was "reasonably calculated" to enable the child to receive educational benefits. The district court went beyond that here to find something more, that the proposed plan was the best program for M.L. That finding relates to the second step of *Rowley* in that it considers the *substantive* impact on the child rather than the *procedural* process employed to create the plan, but it is not the same inquiry.

With these amendments, Judge Alarcón and Judge Gould have voted to deny the petition for rehearing. Judge Clifton has voted to grant the petition for rehearing.

Judge Gould has voted to deny the petition for rehearing en banc. Judge Alarcón recommends that the petition for rehearing en banc be denied. Judge Clifton has voted to grant the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc. No judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are Denied. No further petitions for rehearing will be entertained.

OPINION

ALARCÓN, Senior Circuit Judge

M.L., a minor, C.D., his mother, and S.L., his father, appeal from the order granting the motions for summary judgment filed by Appellees, the Federal Way School District ("FWSD") and the Washington Superintendent of Public Instruction.[1] They contend, inter alia, that the failure of the FWSD to include a regular education teacher on the team that prepared M.L.'s individualized education program ("IEP") rendered the IEP invalid.

I am persuaded that we must reverse the order granting summary judgment because the failure of the FWSD to include a regular education teacher on the IEP team significantly deviated from the procedural requirements of the Individuals with Disabilities Education Act ("IDEA") that *at least one* regular education teacher be included in the development of an IEP for a student with a disability pursuant to 20 U.S.C. § 1414(d)(1)(B)(ii). This critical structural defect in the constitution of the IEP team precludes us from considering whether the IEP developed without the inclusion of at least one regular

---

[1] The complaint in this matter named the Washington Superintendent of Public Instruction ("SPI") as a party to this action. The district court granted summary judgment in favor of the SPI on the basis that the claim was "premature." While the notice of appeal refers to the order granting summary judgment to "respondent," the Appellants have not raised any issue challenging the merits of the summary judgment order in favor of the SPI. Thus, it would appear that the Appellants have abandoned their appeal regarding the SPI.

education teacher was reasonably calculated to enable M.L. to receive a free and appropriate public education ("FAPE"). I believe we must vacate the judgment and remand with instructions that the district court enter an order directing the FWSD to select an IEP team that complies with the procedural requirements of the IDEA.

Judge Gould has filed a separate concurring opinion in which he joins me in concluding that the omission of a regular classroom teacher from M.L.'s IEP team was a procedural error and that we must reverse the district court's order granting a summary judgment. Judge Gould has applied the harmless error standard of review, instead of the structural defect analysis I have employed, in concluding that the judgment must be reversed.

In his dissent, Judge Clifton agrees with Judge Gould that the harmless error test must be applied in this matter, but concludes that the school district's error in failing to include a regular classroom teacher on the IEP team, as required by the IDEA, was harmless error, and did not result in the loss of an educational opportunity for M.L., or deny him a free appropriate public education.

I

Unless otherwise indicated, the facts are undisputed. M.L. was born on November 13, 1994. He suffers from autism, mental retardation, and macrocephaly.[2] As of February 2001, he was globally delayed across all developmental domains consistent with his cognitive level, and

[2] Macrocephaly is a condition that causes the distance around the widest part of the skull to be greater than expected for the age and background of the child.

displayed significant behavioral problems. M.L. was almost completely nonverbal, had virtually no communication skills, was not toilet trained, and had a cognitive ability that placed him in the first percentile on the Battelle Developmental Inventory.[3]

Dr. Ilene Schwarz, an expert regarding educational practices for children with autism, indicated that M.L. might be able to perform tasks with a familiar service provider, but would be unable to demonstrate those skills when asked to do so in another environment. M.L. had made gains in physical therapy between 1997 and 2000. The progress reports from Puget Sound Therapy Services indicate, however, that as of August 2000, M.L. frequently had temper tantrums and displayed aggressive behavior such as hitting and pinching, which interfered with his performance in therapy. M.L.'s occupational therapist recommended that M.L. would benefit from a more structured environment.

M.L. was enrolled in the Tukwila Preschool at the Riverton Park United Methodist Church in the Tukwila School District in November 1997. He attended preschool four days per week for approximately two hours per day for three years. Except for a few months in his third year, M.L. was continuously assigned to Jodie Wicks's integrated preschool class until June 2000.[4] The class followed

---

[3] The Battelle Developmental Inventory Screening Test is administered to children six months to eight years old and includes subtests which measure fine and gross motor, adaptive, personal-social, receptive and expressive language, and cognitive skills.

[4] An "integrated" or "regular" classroom consists of both typically developing children and a small number of disabled children. They are taught by a "regular education" teacher.

the same routine each day, using the same songs and activities. Each year the class also included several of the same students and the same instructional assistants.

M.L.'s skills improved over the course of his three years in Ms. Wicks's preschool class. M.L. began to interact more frequently with other children and participated, to a limited extent, in classroom activities. M.L. was teased a few times while enrolled there. During the three years he was enrolled in Ms. Wicks's class, he was assigned a one-on-one instructional assistant who remained with him throughout the day.

M.L. displayed increasingly aggressive behavior during that time. This conduct was documented by many of his service providers. His level of aggression escalated when he was frustrated or given more challenging tasks. He would cry, whine, or bite and scratch his instructional assistant. He mouthed many objects and on at least one occasion bit another child. Lai Doo, M.L.'s in-home therapist, testified that as M.L.'s level of communication increased, his level of aggression decreased. However, Ms. Doo also stated that M.L.'s "level of aggression seem[ed] to be a lot more severe than the others that [she had] seen."

Because M.L. is disabled, the Tukwila School District was required by 20 U.S.C. § 1414(d)(1)(A) to create an IEP each year that stated M.L.'s "present levels of educational performance," outlined the "special education and related services . . . to be provided to [M.L.]," and set forth "measurable annual goals." On January 31, 2000, the Tukwila School District's IEP team prepared an IEP for M.L.'s initial placement for the 2000-2001 academic year ("Tukwila IEP"). Ms. Wicks, M.L.'s preschool teacher, was a member of the IEP team. The IEP provided that M.L. was

to be enrolled in September 2000 in an integrated kindergarten class for 130 minutes, four times per week, and was to receive additional therapy and instructional services.

Prior to M.L.'s enrollment in an integrated kindergarten class in the Tukwila School District, M.L. and his family moved to the FWSD on or about July 30, 2000. M.L. was enrolled at the Mark Twain Elementary School in the FWSD. The FWSD implemented the Tukwila IEP for M.L. until it was due to expire on September 30, 2000. Accordingly, M.L. was placed in Sandy Ramsey's integrated kindergarten class in the Mark Twain Elementary School. Ms. Ramsey is certified as a regular and special education teacher.

At C.D.'s suggestion, Ms. Ramsey controlled M.L.'s behavior in class by letting him listen to his favorite music on his headphones. The FWSD hired a series of one-on-one instructional assistants to work with M.L. Each of them quit after working with him for one day.

C.D. attended class with M.L. during the five days that M.L. was enrolled at the Mark Twain Elementary School. On September 5, 2000, C.D. witnessed two boys teasing M.L. She discussed this incident with Ms. Ramsey and Pat Warden, Ms. Ramsey's classroom assistant. Ms. Ramsey responded that she "would make a note and make it a priority to keep observing – keep an eye on these children and a better eye on [M.L.] to see if anything continued to happen so she could address any incidents that might happen." On September 6, 2000, C.D. observed more children teasing M.L. at recess. She reported this conduct to Ms. Ramsey and Ms. Warden. C.D. later testified, however, that M.L. was "happy as a little lark" during recess.

On September 7, 2000, C.D. again observed children teasing M.L. at recess and during class time. She discussed

this conduct with Ms. Ramsey. Ms. Ramsey told C.D. that she "had not witnessed any teasing of M.L. during class, but would continue to watch for it and intervene if necessary." Ms. Ramsey informed C.D. that "policies were in place regarding teasing and that she did not allow such behavior in her class."

C.D. witnessed additional teasing incidents on September 8 and September 11, 2000. She reported these events to Ms. Ramsey. Ms. Ramsey replied that "she would keep an eye on [M.L.] and would take care of it." Ms. Ramsey did not take any action regarding the teasing incidents. C.D. testified that there was no evidence that M.L. was actually affected by the teasing and that "because he had his headphones on most of the time he was being teased . . . [she] didn't know if he even heard it."

On September 12, 2000, C.D. called Diane Niksich-Conn, the Vice-Principal of the Mark Twain Elementary School, to report a teasing incident that had occurred the previous day. Vice-Principal Niksich-Conn suggested that C.D. contact Ms. Ramsey. Ms. Niksich-Conn then contacted Ms. Ramsey and advised her to talk to C.D.

On September 13, 2000, Ms. Ramsey telephoned C.D. to discuss her complaint that M.L. had been teased on September 11, 2000. Ms. Ramsey informed C.D. that the teasing that took place on September 11, 2000 was the only incident that she had observed. Ms. Ramsey testified that during that conversation, she requested that C.D. give her an opportunity to stop the teasing of M.L. by other children before C.D. took the matter further. M.L. did not return to the Mark Twain Elementary School after September 11, 2000. C.D. did not speak with the FWSD administrator before removing her child from the school.

On or about September 17, 2000, the FWSD offered to place M.L. at the Wildwood Elementary School in a self-contained classroom[5] taught by Teresa Thomas, a certified special education teacher with experience teaching autistic children. C.D. refused to enroll M.L. in the Wildwood Elementary School because she believed that a self-contained classroom would not provide for sufficient participation with regular education students. She thought that "it could be potentially dangerous for [M.L.]" to interact with the other students in the self-contained classroom. C.D. did not visit Ms. Thomas's classroom at any time.

After the Tukwila IEP expired on September 30, 2000, a multidisciplinary team met on October 6, 2000, to determine whether M.L. should be provided special education services in the FWSD.[6] A school psychologist, a speech and language pathologist, an occupational therapist, and C.D. participated in the initial evaluation. No regular

---

[5] A "self-contained" classroom consists of only disabled students.

[6] *See* 20 U.S.C. § 1414(a)(1)(A)-(B):

> (1) Initial evaluations
>
> (A) In general
>
> A State educational agency, other State agency, or local educational agency shall conduct a full and individual initial evaluation, in accordance with this paragraph and subsection (b) of this section, before the initial provision of special education and related services to a child with a disability under this subchapter.
>
> (B) Procedures
>
> Such initial evaluation shall consist of procedures –
>
> (i) to determine whether a child is a child with a disability (as defined in section 1401(3) of this title); and
>
> (ii) to determine the educational needs of such child.

education teacher participated in this assessment. In addition to observing M.L. for two hours, and interviewing C.D., the initial evaluation consisted of extensive review of records from providers identified by C.D. and the Tukwila IEP. The school psychologist also interviewed Ms. Wicks.

The group produced a report ("Evaluation Report") that recommended that M.L. be placed in a special education program that offered a small class size, provided visual supports, and predictable and consistent schedules and routines. On or about October 25, 2000, Dr. Sarah Drinkwater, FWSD's director of student support services, offered to place M.L. at the Wildwood Elementary School, the Mark Twain Elementary School, or several other schools within the FWSD. C.D. rejected each of these suggestions. On October 27, 2000, Appellants filed a written objection to the Evaluation Report. They also requested that the FWSD provide for an independent evaluation of M.L. at public expense. In response, the FWSD filed a request for a due process hearing.

On November 1, 2000, Dr. Lee Saffrey, a FWSD program specialist, mailed Appellants a letter proposing an IEP meeting for November 13, 2000 at 8:00 a.m. at the Wildwood Elementary School. C.D. faxed a letter to Dr. Saffrey on November 1, 2000, in which she stated that she would not attend any IEP meetings unless "the staff from [her] child's neighborhood school (Starlake Elementary)" were present and only if the meetings were held at the FWSD administration offices or the Starlake Elementary School. C.D. also indicated that she would be available to attend an IEP meeting on November 13, 2000 after 6:00 p.m. On November 2, 2000, Dr. Saffrey notified C.D. that the location of the meeting had been changed to the administrative offices of the FWSD and that the meeting

would occur at 4:00 p.m. on November 13, 2000. Dr. Saffrey also informed C.D. that Sarah Sapronari, a regular education and special education teacher, would be a member of the IEP team.

On November 6, 2000, C.D. faxed a letter to the FWSD in which she stated that she would not be able to attend the proposed IEP meeting at 4:00 p.m. on November 13, 2000. She stated that she would be available between 4:15 a.m. and 5:15 a.m., or at 6:00 p.m. on any Tuesday, Wednesday, Thursday or Friday, and at 7:00 p.m. or later on Mondays. She also suggested meeting on Saturdays or Sundays. Dr. Saffrey notified C.D. that an IEP meeting could be conducted only during the day from 7:00 a.m. to 4:00 p.m. on any day Monday through Friday. Dr. Saffrey informed C.D. that she could also participate via a conference call. C.D. replied on November 9, 2000, that she would not be able to attend an IEP team meeting during the hours and days suggested by Dr. Saffrey, nor could she or her husband participate in a conference call on November 13, 2000.

The Administrative Law Judge ("ALJ") found that the assertion that M.L.'s parents could not attend the IEP meeting at 4:00 p.m. was not credible. S.L.'s time sheet records from his employer indicate that on November 13, 2000, his workday ended at 2:58 p.m. At the hearing before the ALJ, C.D. testified that she was not able to attend the November 13, 2000 IEP team meeting at 4:00 p.m. or participate in a conference call because M.L. had an afternoon appointment on that day with Northwest Behavioral Associates. She stated she left home at 3:45 p.m. and did not return until 7:30 p.m. The ALJ found that this testimony was not credible. C.D.'s fax machine log reflected that C.D. sent a fax from her home on November

13, 2000 at 5:05 p.m. The cover sheet was in C.D.'s handwriting.

The FWSD IEP meeting was held on November 13, 2000, at 4:00 p.m. Appellants did not attend. Ms. Thomas, a certified special education teacher assigned to the Wildwood Elementary School, was a member of the IEP team. However, no regular education teacher participated in the IEP meeting or evaluated the facts to determine whether the IEP was reasonably calculated to provide M.L. with a FAPE.

A letter written by Ms. Wicks, M.L.'s preschool teacher, dated May 10, 2000, was considered by the IEP team. She stated in this letter that "[M.L.] has made good progress in this setting and exceptional gains in socialization." She recommended that M.L. "remain[] in a general education kindergarten classroom during his kindergarten year and that he continue to be supported by a one-on-one assistant."

After reviewing the Tukwila IEP, M.L.'s school records, and Ms. Wicks's recommendation, the FWSD IEP team concluded that M.L. "would do better in a smaller setting with the opportunity to work on specific skill areas" and recommended placement in Ms. Thomas's self-contained classroom at the Wildwood Elementary School. The IEP provided for mainstreaming opportunities[7] during lunch, recess, assemblies, music, library, and school activities.

[7] "Mainstreaming" is a term used to describe opportunities for disabled students to engage in activities with non-disabled students.

Ms. Thomas's curriculum incorporated specialized strategies for teaching autistic children. Ms. Thomas's self-contained classroom was smaller than an integrated kindergarten and was specially designed for students ranging from kindergarten through sixth grade.

The FWSD mailed a copy of the IEP to M.L.'s parents on November 17, 2000. Dr. Drinkwater also enclosed a letter offering M.L.'s parents the opportunity to discuss and refine the IEP. M.L.'s parents did not do so, but instead requested a due process hearing before an ALJ with the Department of Education.

In February 2001, an eight-day due process hearing regarding the appropriateness of the IEP was held before an ALJ pursuant to the IDEA. The ALJ found that "the District's evaluation team was appropriately constituted." The ALJ denied Appellants' motion for reconsideration.

Appellants sought review of the ALJ's decision before the United States District Court for the Western District of Washington pursuant to 20 U.S.C. § 1451(i)(2)(A). In their petition for judicial review and complaint, Appellants alleged, inter alia, that the FWSD failed to comply with the procedural safeguards provided for under 20 U.S.C. §§ 1400-15, 34 C.F.R. §§ 300.1-.556, and Washington state law.

Appellants filed a motion for partial summary judgment in which they alleged that the FWSD violated the procedural requirements of the IDEA by failing to include a regular education teacher on the IEP team. The FWSD filed a cross motion for summary judgment. The district court denied Appellants' partial motion for summary judgment and granted the FWSD's motion. The district court found that because M.L. was new to the school

district, and not participating in regular education classes at the time the IEP meeting took place, "it [was] permissible to include only teachers [on the IEP team] who are likely to be entrusted with him in the new placement." The district court also stated: "Even if the Court were to find that the district's failure to include a regular education teacher of M.L.'s on the IEP team amounted to a procedural violation of the IDEA, such violation would not necessarily constitute the denial of a FAPE." Appellants filed a timely notice of appeal on May 29, 2002. The district court had jurisdiction pursuant to 20 U.S.C. § 1415(i)(2)(A). We have jurisdiction pursuant to 28 U.S.C. § 1291.[8]

---

[8] The FWSD filed a motion with this court on December 24, 2002, requesting that we supplement the administrative record to include the testimony of Diane Niksich-Conn. In their supplemental letter brief, Appellants argue that normally a reviewing court will not supplement the record with material not considered by the district court. We have previously held, however, that "[i]n reviewing the record, this court must examine the administrative record as *a whole*. . . ." *Gonzalez v. Sullivan*, 914 F.2d 1197, 1200 (9th Cir. 1990) (emphasis added); *see also* 20 U.S.C. § 1415(i)(2)(B)(1) (stating that in reaching its decision, a reviewing court is required to "receive the records of the [state] administrative proceedings"). In addition, Rule 10(e) of the Federal Rules of Appellate Procedure allows the record to be corrected if "anything material to either party is omitted from or misstated in the record by error or accident."

It is clear that Ms. Niksich-Conn's testimony was erroneously omitted from the administrative record considered by the district court. Since we are required to consider the entire administrative record in determining whether the district court erred in determining the appropriateness of a special education placement, we grant the FWSD's motion to supplement the record.

II

A.

In this appeal, Appellants contend that the FWSD's failure to include a regular education teacher on the IEP team was a "significant violation" of the procedural requirements of the IDEA and renders the IEP invalid to ensure that a disabled child receives a FAPE. The FWSD argues in response that it did not violate the procedural requirements of the IDEA that at least one regular education teacher participate in evaluating the factors to be considered in the preparation of an IEP because three members of the team had "significant teaching experience." Appellees' Brief at 15. No authority was cited for this proposition. I construe this argument as a reluctant concession that at least one regular education teacher was not a member of the IEP team, as required by the IDEA. We review de novo whether a school district's proposed IEP provides a FAPE under the IDEA. *W.G. v. Bd. of Trustees*, 960 F.2d 1479, 1483 (9th Cir. 1992) (*"Target Range"*). We review a district court's findings of fact in an IDEA case for clear error. *Gregory K. v. Longview Sch. Dist.*, 811 F.2d 1307, 1310 (9th Cir. 1987).

The IDEA was enacted by Congress to assist state and local agencies financially in educating students with disabilities. *Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467, 1469 (9th Cir. 1993). Its goal is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living. . . ." 20 U.S.C. § 1400. The term "free appropriate public education" is defined as "special education and related services that . . . are provided in conformity with the

individualized education program required under section 1414(d) of this title." 20 U.S.C. § 1401(8). The term "individualized education program" is defined in the IDEA as "a written statement for each child with a disability that is developed, reviewed, and revised in accordance with section 1414(d) of this title." 20 U.S.C. § 1401(11).

Section 1412(6)(A) provides that "[c]hildren with disabilities and their parents are afforded the procedural safeguards required by section 1415 of this title." 20 U.S.C. § 1412(6)(A). A state is required to "conduct a full and individual initial evaluation . . . before the initial provisions of special education and related services to a child." 20 U.S.C. § 1414(1)(A).

In § 1414(d)(1)(B), Congress set forth persons who must be included on an IEP team to evaluate a disabled student's special educational needs. The statute provides as follows:

> The term "individualized education program team" or "IEP Team" means a group of individuals composed of –
>
> > (i) the parents of a child with a disability;
> >
> > (ii) at least one regular education teacher of such child (if the child is, or may be, participating in the regular education environment);
> >
> > (iii) at least one special education teacher, or where appropriate, at least one special education provider of such child;

> (iv) a representative of the local educational agency who –
>
> > (I) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;
> >
> > (II) is knowledgeable about the general curriculum; and
> >
> > (III) is knowledgeable about the availability of resources of the local educational agency;
>
> (v) an individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in clauses (ii) through (vi);
>
> (vi) at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and
>
> (vii) whenever appropriate, the child with a disability.

20 U.S.C. § 1414(d)(1)(B).

The IDEA also provides that "[t]he regular education teacher of the child, as a member of the IEP Team, shall, to the extent appropriate, participate in the review and revision of the IEP of the child." 20 U.S.C. § 1414(d)(4)(B). The regulations drafted to implement the IDEA contain the following provisions:

> The public agency shall ensure that the IEP team for each child with a disability includes –
>
> (1) The parents of the child;
>
> (2) At least one regular education teacher of the child (if the child is, or may be, participating in the regular education environment). . . .

34 C.F.R. § 300.344(a).

In Appendix A to Part 300 of Title 34, the following commentary explains the critical role of a regular education teacher in developing an IEP:

> Regular Education Teacher Participation in the Development, Review, and Revision of IEPs
>
> Very often, regular education teachers play a central role in the education of children with disabilities (H. Rep. No. 105-95, p. 103 (1997); S. Rep. No. 105-17, p. 23 (1997)) and have important expertise regarding the general curriculum and the general education environment. Further, with the emphasis on involvement and progress in the general curriculum added by the IDEA Amendments of 1997, regular education teachers have an increasingly critical role (together with special education and related services personnel) in implementing the program of FAPE for most children with disabilities, as described in their IEPs.
>
> Accordingly, the IDEA Amendments of 1997 added a requirement that each child's IEP team must include at least one regular education teacher of the child, if the child is, or may be, participating in the regular education environment (*see* § 300.344(a)(2)). (*See also* §§ 300.346(d)

> on the role of a regular education teacher in the development, review and revision of IEPs.).

34 C.F.R. 300 app. A.

Prior to 1997, the IDEA provided that the school district was obligated to include the student's current teacher as a member of the IEP team. In 1997, Congress revised the IDEA to require the inclusion of "at least one regular education teacher of such child (if the child is, *or may be*, participating in the regular education environment)" and "at least one special education teacher, or where appropriate, at least one special education provider of such child." 20 U.S.C. § 1414(d)(1)(B) (2003) (emphasis added).

The plain meaning of the terms used in section 1414(d)(1)(B) compels the conclusion that the requirement that least one regular education teacher be included on an IEP team, if the student may be participating in a regular classroom, is mandatory – not discretionary. Thus, the district court's finding that the IEP team was properly constituted under the IDEA without at least one regular education teacher was clearly erroneous. Accordingly, we must decide whether the FWSD's failure to comply with the requirement of the IDEA that at least one regular education teacher evaluate the unique needs of a disabled student fatally compromised the integrity of the IEP and compels us to reverse the district court's judgment without considering whether the error was harmless or whether the findings of the ALJ and the district court that the IEP meets the substantive requirements of the IDEA are clearly erroneous.

B.

Citing *Poolaw v. Bishop*, 67 F.3d 830, 833 (9th Cir. 1995), FWSD contends that "[a] district court's determination that a student is incapable of deriving educational benefits unless placed in a self contained program is reviewed for clear error." Appellees' Brief at 21-22. This standard of review is only applicable to a district court's factual findings regarding whether a school district has complied with the IDEA. "The appropriateness of a special education placement under the IDEA is reviewed *de novo*." *Poolaw*, 67 F.3d at 833 (citing *Target Range*, 960 at 1483). Because FWSD violated the procedural requirement of the IDEA that at least one regular education teacher participate in the evaluation of an IEP, we are precluded by the law of this circuit from considering the district court's factual findings regarding the merits of the substantive provisions of the IEP.

In *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982), the Supreme Court instructed that a state must comply both procedurally and substantively with the IDEA. *Id.* at 206-07. The Court held that "a court's inquiry in suits brought under § 1415(e)(2) is twofold. First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" *Id.* (footnotes omitted). The Court reversed the judgment of the Court of Appeals which had affirmed the district court's decision that a deaf child was denied a FAPE because school administrators denied her parents' request that she be provided with the services of a qualified sign language interpreter in all of her classes. *Id.* at 209-10. The Court held, "[T]he findings of neither court would support a conclusion that Amy's

educational program failed to comply with the *substantive* requirements of the Act." *Id.* at 209 (emphasis added). While the Court concluded that the findings of the district court that the IEP complied with the substantive provisions of the IDEA were not clearly erroneous, it held that a remand was compelled because the district court failed to determine whether the state complied with the procedural requirements of the IDEA. *Id.* at 209-10. Here, the district court determined that the FWSD did not violate the procedural requirements of the IDEA. Thus, even if we assume *arguendo* that the findings of the ALJ and the district court in this matter that the IEP complied with the substantive requirements of the Act pursuant to *Rowley*, we must determine the effect on the district court's judgment of the FWSD's failure to comply with its duty under IDEA to appoint at least one regular education teacher to the IEP team.

To date, the Supreme Court has not expressly determined whether a violation of the procedural requirements of the IDEA is subject to harmless error review. That issue was not properly before it in *Rowley* because the district court had failed to rule on the respondents' contention that petitioners had failed to comply with the IDEA's procedural requirements. 458 U.S. at 210 n.32.

In cases decided after *Rowley* was published, we have concluded that we will not review the substantive provisions of an IEP if a school district fails to include on the IEP team persons identified by Congress as possessing the necessary qualifications to develop an IEP. In *Target Range*, we commented that "[p]rocedural flaws do not automatically require a finding of a denial of a FAPE. However, procedural inadequacies that result in the loss of educational opportunity, or seriously infringe on the

parents' opportunity to participate in the IEP formulation process, clearly result in the denial of a FAPE." 960 F.2d at 1484 (internal citations omitted).

In *Target Range*, we held that the school district violated the procedures mandated by Congress in the IDEA by failing to secure the participation of the disabled student's regular education teacher, or any representative of the private school he attended after the school district refused to identify him as disabled or develop an IEP. We held in *Target Range* that "the procedural defects in the development of the IEP resulted in denying [the student] a FAPE." *Id.* at 1485. We reasoned that because the school district failed to consider the recommendations of persons who were the most knowledgeable about the child, it failed its "duty to conduct a meaningful meeting with the appropriate parties" and accordingly, it did not "develop a complete and sufficiently individualized educational program according to the procedures specified by the Act." *Id.* at 1485. We also concluded that where the procedural inadequacies of an IEP may have resulted in the loss of an educational opportunity, or deprived a child's parents of the opportunity to participate meaningfully in forming an IEP, an appellate court should not proceed to step two of the *Rowley* analysis, i.e., whether the IEP was reasonably calculated to enable the child to receive educational benefits. *Id.*

In *Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 877 (9th Cir. 2001), we applied the principles set forth in *Rowley* and *Target Range*. We concluded that the school district's procedural violations in developing an IEP prevented the child from receiving a FAPE. *Id.* at 890-91. In *Amanda J.*, the school district failed to allow the child's parents "to examine all relevant records with respect to

the identification, evaluation, and educational placement of the child" as required by 20 U.S.C. § 1415(b)(1)(A). *Id.* at 891 (quoting 20 U.S.C. § 1415(b)(1)(A)). We held that "[p]rocedural violations that interfere with parental participation in the IEP formulation process undermine the very essence of the IDEA." *Id.* at 892. We characterized the procedural violation as "egregious." *Id.* at 891. We declined to address the question whether the IEP was reasonably calculated to enable Amanda J. to receive educational benefits. *Id.* at 895 (citing *Target Range*, 960 F.2d at 1485).

More recently, in *Shapiro ex rel. Shapiro v. Paradise Valley Unified Sch. Dist.*, 317 F.3d 1072 (9th Cir. 2003), we held that the failure to include a representative from the private school that the child was currently attending on the IEP team violated the procedural requirements of the IDEA. We reasoned that the failure to include "the teachers most knowledgeable about [the child's] special educational levels and needs" was a violation of the IDEA. *Id.* at 1076-77. We concluded in *Shapiro* that it was not necessary to address the second prong of the *Rowley* FAPE analysis. *Id.* at 1079 (citing *Amanda J.*, 267 F.3d at 895, and *Target Range*, 960 F.2d at 1485).

The FWSD maintains that the failure to include at least one regular education teacher on the team that developed the IEP is not the type of procedural flaw that would compel us to hold that Appellants were denied their right to a FAPE. They cite our decision in *Ford v. Long Beach Unified Sch. Dist.*, 291 F.3d 1086 (9th Cir. 2002) for this proposition. Their reliance on *Ford* is misplaced. It is readily distinguishable.

In *Ford*, the state's hearing officer and the district court upheld the school district's assessment that a student was not disabled. *Id.* at 1087. Before this court, the student's parents contended that "the assessment [of Amanda's abilities and disabilities] was inadequate because it did not include classroom observation of Amanda by someone other than her regular education teacher as required by C.F.R. § 300.542." *Id.* at 1089. Because the student was assessed as not being disabled, no IEP was developed. We held in *Ford* that the failure to comply with the C.F.R. § 300.542 "did not affect the validity of the assessment." *Id.* at 1089. No contention was asserted in *Ford* that the school district violated the procedural requirements of the IDEA by its failure to include an individual identified by Congress as necessary to evaluate a student's abilities or disabilities. Thus, our opinion in *Ford* does not resolve the question whether the failure of the FWSD to include at least one regular education teacher on the IEP prejudiced Appellant's rights to a FAPE.

The record demonstrates that the FWSD failed to comply with the "rigorous procedural requirements of IDEA." *Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1524 (9th Cir. 1994). The failure to include at least one regular education teacher on the IEP team deprived the team of "important expertise regarding the general curriculum and the general educational environment." 34 C.F.R. 300 app. A. The IEP team did not include individuals Congress concluded were most knowledgeable about a disabled student's special educational needs. As a result, we have no way of determining whether the IEP team would have developed a different program after considering the views of a regular education teacher. The failure to include at

least one regular education teacher on the IEP team was a structural defect in the constitution of the IEP team.

In cases involving criminal prosecutions, the Supreme Court has ruled that a structural defect in the trial mechanism is not subject to harmless error analysis. *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991). We have defined a structural defect as "an error 'that permeate[s] the entire conduct of the trial from beginning to end or affect[s] the framework within which the trial proceeds.'" *United States v. Recio*, 371 F.3d 1093, 1102 (9th Cir. 2004) (quoting *Rice v. Wood*, 77 F.3d 1138, 1141 (9th Cir. 1996) (internal citations and quotation marks omitted)).

The requirement that an appellate court must reverse because of the effect of a structural error has been applied in civil disputes where members of an evaluation board expressly mandated by Congress were not included. In *Doyle v. United States*, 599 F.2d 984 (Cl. Ct. 1979), *amended on other grounds by* 609 F.2d 990 (Cl. Ct. 1979), the Court of Claims reversed the decision of the Army Board for the Correction of Military Records because none of the selection boards convened for the evaluation of reserve officers for promotion to permanent rank included any reserve officers, as required by 10 U.S.C. § 3362(b) (repealed and recodified at 100 U.S.C. § 14102(b)). The Court of Claims held that the failure to include reserve officers on the selection boards for evaluating reserve officers for promotion was not subject to harmless error analysis. It reasoned as follows:

> The error in this case, however, is not a violation of the plaintiffs' substantive rights but rather a violation of the plaintiffs' rights to fair procedure or process. We are not unmindful of the fact that

the due process protections of the fifth amendment have been sparingly extended to government employees, but that problem is immaterial to this case. The error is the violation of procedures instituted by statute and regulation, and, though federal employees may not be entitled to any procedure not established by Congress or agency, we have always held that they are entitled to such procedure that has been so provided.

Since this case presents the issue of procedural errors in the decision-making process of a selection board, we find those cases dealing with the violation of constitutional procedural rights to be more analogous. The Supreme Court has recognized that even in the case of constitutional error occurring in a criminal trial, not every such error requires "the automatic reversal of the conviction"; a conviction will be upheld if the "federal constitutional error . . . was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 22, 24, 87 S.Ct. 824, 827, 828, 17 L.Ed.2d 705 (1967). *See, e.g., Harrington v. California*, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969) (violation of sixth amendment right of confrontation); *United States v. Parker*, 549 F.2d 1217, 1221 (9th Cir. 1977), *cert. denied*, 430 U.S. 971, 97 S.Ct. 1659, 52 L.Ed.2d 365 (1977) (prosecutor's comment on defendant's failure to testify, in violation of fifth amendment).

Some constitutional rights, however, are "so basic to a fair trial that their infraction can never be treated as harmless error. . . ." *Chapman v. California, supra*, 386 U.S. at 23, 87 S.Ct. at 827 (coerced confession, right to counsel, impartial judge). These include cases in which compositional defects are found to exist in respect to juries. *See, e.g., Whitus v. Georgia*, 385 U.S. 545, 87

S.Ct. 643, 17 L.Ed.2d 599 (1967). Two justifications for the rule of automatic reversal are generally advanced. First, some errors are so inimical to judicial or fair process that their violation cannot be tolerated under any circumstances. Application of the test of harmless error would result in the dilution of the afforded protection. Second, a court, in the case of some errors, such as the improper composition of a jury or the bias of a judge, "has no way of evaluating the effect of the error on the judgment in the dark of what might have been but never was, ..." R.J. Traynor, *The Riddle of Harmless Error* 66 (1970).

Though the proceeding involved herein is evaluational, not accusatory, and the error statutory, not constitutional, we do not for these reasons believe that these plaintiffs are entitled to any less protection. Decisions of selection boards have important consequences for those considered. They are either promoted to higher rank and pay or are terminated and lose their employment and pay. The statute explicitly commands that selection boards shall be composed of an appropriate number of Reserve officers so that Reserve officers will not be prejudiced and so that Congress' purpose that the nation is protected by a military composed of those officers best qualified regardless of their status as Regular or Reserve officers, is carried out. We believe that Congress' purpose would be thwarted unless a Secretary is aware that this is a statutory requirement that cannot be waived.

Moreover, we believe that the second justification for the automatic reversal rule, that it is not possible for a reviewing body to determine what effect the error had on the judgment of the original

> proceeding, forces us to conclude that the doctrine of harmless error cannot be applied to this type of procedural error.

Id. at 995-96.

In *Dilley v. Alexander*, 603 F.2d 914 (D.C. Cir. 1979), the United States Court of Appeals for the District of Columbia held that the failure of the Army to include reserve officers on a promotion board violated 10 U.S.C. § 266 (1976). *Id.* at 920. The court rejected the Army's contention that the appellants were not prejudiced by the defect in the composition of the promotion board because a subsequently properly constituted Relook Board found that the defect in the composition of the 1975 promotion board did not result in any prejudice to the appellants. The court stated: "[T]he *prejudice* which the statute guaranteed against, insofar as reserve officers were concerned, was consideration by a promotion board devoid of reserve officers." *Id.* at 921 (emphasis in original). In addition, the court reasoned that the Relook Board's findings, "while laudable perhaps, are either irrelevant or incorrect as a matter of law. Although a desire to eliminate prejudice obviously occasioned the enactment of the statute, section 266 itself does not outlaw anti-Reserve bias. *It prescribes a procedural entitlement that no subsequent factual findings can diminish.*" *Id.* at 923-24 (emphasis added). The court further commented in *Dilley* that, "Congress made a decision over a quarter of a century ago that a promotion selection board considering Reserve candidates was inherently defective if it lacked Reserve representation; the Army was not at liberty to review and reverse that congressional decision on its own." *Id.* at 924.

I am persuaded by the analysis in *Doyle* and *Dilley* that the failure to include the individuals identified by

Congress as necessary participants in evaluating whether entitlement to benefits has been demonstrated is applicable to an administrative proceeding under the IDEA. Accordingly, I conclude that the failure to include at least one regular education teacher, standing alone, is a structural defect that prejudices the right of a disabled student to receive a FAPE. Under these circumstances, a review of the findings of the ALJ and the district court regarding the merits of the substantive recommendations of an illegally constituted IEP team for clear error would produce a futile advisory opinion which is beyond our judicial power or competence.

C.

The FWSD argues that the participation of a regular education teacher on the IEP team was not required because it was not likely that M.L. would be placed in an integrated classroom since the Evaluation Report recommended against it. This argument completely ignores the fact that the record shows that the Tukwila IEP directed that M.L. be placed in a regular kindergarten classroom. M.L. had attended a regular preschool classroom for three years. After his family moved to the FWSD, M.L. was placed in Ms. Ramsey's regular education classroom. This contention is also inconsistent with the FWSD's representation that "the District did not predetermine the Student's placement." Appellees' Brief at 35. In light of these facts, the record supports an inference that it was possible that M.L. would be placed in a regular education classroom. So long as this was a possibility, participation of a regular education teacher in the IEP team was required by the IDEA.

The FWSD was aware that two teachers had observed M.L. in an integrated classroom. Ms. Ramsey had observed him for one week before his mother withdrew him because he was teased by non-disabled children. Ms. Wicks had observed M.L. for three years in an integrated preschool classroom. Of the two regular education teachers, Ms. Wicks was the most knowledgeable about M.L.'s educational needs because she had been his teacher for three years. She recommended that M.L. be placed in an integrated classroom. The FWSD did not include either Ms. Ramsey or Ms. Wicks or any other regular education teacher on its IEP team.

The FWSD appears to suggest that the Appellants waived their right to object to the failure to include a regular education teacher on the IEP team because they failed to attend the IEP meetings. The FWSD argues that "[t]he District attempted to facilitate the Parents' participation in the IEP meeting but the Parents refused to attend. Their refusal to participate was at their own risk." Appellees' Brief at 36-37. We rejected a similar argument in *Target Range*:

> *The Act imposes upon the school district the duty to conduct a meaningful meeting with the appropriate parties.* Target Range failed to do so. Target Range failed to fulfill the goal of parental participation in the IEP process and failed to develop a complete and sufficiently individualized educational program according to the procedures specified by the Act.

960 F.2d at 1485 (emphasis added).

The FWSD's assumption-of-the-risk defense betrays its misunderstanding of the importance of the procedural

requirements of the IDEA. The Supreme Court stated in *Rowley*, that "[w]e think that the congressional emphasis upon full participation of concerned parties throughout the development of the IEP . . . demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of the substantive content in an IEP." *Id.* at 206.

Clearly, under the circumstances of this case, Ms. Wicks was a concerned party regarding the placement of M.L. in an integrated classroom because he was her student for three years. Because she was not included in the IEP team, we have no way of ascertaining whether her observations would have persuaded the other team members to formulate a different program for M.L. that would be appropriately tailored to his abilities and special needs. Ms. Ramsey's more limited observation of M.L. in her integrated classroom might also have assisted the IEP team in ensuring that M.L. received a FAPE based on his physical and mental condition. Indeed, any regular education teacher would have contributed his or her knowledge of the ability of a disabled student to benefit from being placed in a regular classroom. The Appellants are not responsible for the FWSD's violation of the procedural requirements of the IDEA.

The FWSD argues that it was not compelled to ensure the participation of a regular education teacher "because the evaluators had recommended a self-contained placement." Appellees' Brief at 28. This argument ignores the fact that although the FWSD named a regular education teacher to be a member of the IEP team, she did not attend the November 13, 2000 meeting. Having determined a regular education teacher should be a member of

the IEP team, the FWSD should have cancelled that meeting instead of proceeding with an illegally constituted IEP team.

Under the law of this circuit, the FWSD violated the procedural requirements of the IDEA, by failing to ensure the participation of a regular education teacher in the evaluation of M.L.'s educational needs. This structural defect compels reversal of the district court's judgment without considering the merits of the IEP developed without the evaluation of at least one regular education teacher.[9]

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[9] Although I would apply the structural error analysis outlined above, I recognize that a majority of the panel has adopted a harmless error test instead. How harmless error review is to be conducted is therefore squarely presented. Therefore, I believe I should address the issue so that future panels confronted with it will have an expression of each of our views on this question.

I cannot agree with Judge Clifton's analysis because he relies on the ALJ's and the district court's findings that the placement made by the procedurally defective IEP team was, nevertheless, harmless because it was the best placement for M.L. *See infra* at 639-40 (Clifton, J. dissenting). This approach rewards procedural non-compliance and is at odds with the Supreme Court's holding that the IDEA seeks to achieve its substantive ends largely through procedural means:

> *[T]he importance Congress attached to [the Act's] procedural safeguards cannot be gainsaid.* . . . We think that the congressional emphasis upon full participation of concerned parties throughout the development of the IEP . . . demonstrates the legislative conviction that *adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.*

Rowley, 458 U.S. at 205-06 (emphasis added).

Judge Clifton recognizes that *Rowley* mandates a two-step analysis. *See infra* at 640 (Clifton, J., dissenting). Nevertheless, he appears to

(Continued on following page)

III

The Appellants further assert that M.L. was denied a FAPE because the FWSD failed to take action to prevent other students from teasing M.L. The Appellants argue that there is uncontradicted evidence in the record that the FWSD was deliberately indifferent to C.D.'s reports that her child was being teased. They maintain that the teasing resulted in a denial of a FAPE. Neither the statute nor any court has directly addressed the question whether unremedied teasing can constitute a denial of a FAPE. *Cf. Charlie F. ex rel. Neil F. v. Bd. of Educ.*, 98 F.3d 989, 993 (7th Cir. 1996) (holding that, "at least in principle relief is available under the IDEA" when a teacher invited her pupils to express their complaints about a disabled student which led to humiliation, fistfights, mistrust, loss of confidence and self-esteem, and disruption of his educational progress).

Under the IDEA, a disabled child is guaranteed a FAPE, 20 U.S.C. § 1412(1), which "'provide[s] *educational benefit* to the handicapped child.'" *Gregory K.*, 811 F.2d at 1314 (quoting *Rowley*, 458 U.S. at 201) (emphasis added). If a teacher is deliberately indifferent to teasing of a

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have jumped to the substantive second step to resolve the procedural first step, effectively circumventing the two-step process.

Even under the harmless error standard of review adopted by the majority, it is my view that loss of an educational opportunity cannot be determined by considering the merits of the placement identified in the IEP. Instead, it must be determined by whether the failure to include at least one regular education teacher, as expressly mandated by Congress, had a material and inherently harmful impact on the ability of the defective IEP team to develop a program that was reasonably calculated to enable M.L. to receive educational benefits. Thus, I believe the school district's procedural error was not harmless.

disabled child and the abuse is so severe that the child can derive no benefit from the services that he or she is offered by the school district, the child has been denied a FAPE. *Cf. Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 633 (1999) (holding that to violate Title IX "harassment . . . [must be] so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit").

The record shows that by removing M.L. from Mark Twain Elementary School after only five days, Appellants failed to give the FWSD a reasonable opportunity to find a way to prevent the other students from teasing M.L. Appellants have also failed to demonstrate that teasing resulted in the loss of an educational benefit. Appellants have offered no evidence that the teasing affected M.L. or interfered with his education. C.D. testified that during one of the teasing incidents, M.L. was "happy as a little lark." C.D. also stated that during another episode "because he had his headphones on most of the time he was being teased . . . [she] didn't know if he even heard it."

Appellants contend, without evidentiary support, that unpunished teasing "can easily escalate from mere verbal abuse, to physical or sexual abuse" and is "potentially dangerous." Appellants' Brief at 52, 54. Appellants also argue that teasing poses a particular danger to M.L. since, because he has little or no verbal skills, he would be unable to report any physical abuse. However, Appellants have not directed this court's attention to any violence, or threat of physical contact between another student and M.L. Appellants have not adduced sufficient evidence to show that M.L. was denied a FAPE by the FWSD's alleged failure to stop M.L.'s classmates from teasing him during his five days in a regular education classroom.

CONCLUSION

The FWSD's failure to ensure the participation of a regular education teacher on the IEP team when there was a possibility that M.L. would be placed in an integrated classroom was a significant violation of the structural requirements of the IDEA's procedures requiring vacation of the order granting summary judgment in favor of the FWSD. Upon remand, the district court is instructed to enter an order directing the FWSD to select an IEP team that fully complies with the procedural requirements of the IDEA.

Upon remand, the district court is requested to determine, in its discretion, whether to award reasonable attorneys fees as part of the costs to the Appellants as the prevailing parties pursuant to 20 U.S.C. § 1415(i)(3)(B). The district court should also determine whether the Appellants are entitled to equitable reimbursement for the educational costs they have incurred due to the FWSD's procedural violation of the IDEA.

VACATED and **REMANDED** with instructions.

GOULD, Circuit Judge, concurring in part and concurring in the judgment:

I concur in the judgment and in Sections I, II-A, II-C, and III of Judge Alarcón's opinion. I agree that 20 U.S.C § 1414(d)(1)(B)(ii) requires that at least one regular education teacher be included on an Individualized Education Program ("IEP") team, and that the omission of a regular education teacher from M.L.'s IEP team was procedural error. However, I do not agree with the *per se* "structural defect" analysis adopted by Judge Alarcón in Section II-B. I write separately to make clear that our court's procedural

analysis under IDEA does not start and end with automatic reversal based on a theory of structural error. Instead, we must assess the school district's error for harmlessness – in accord with our precedent in *Target Range*, *Amanda J.*, and *Shapiro* – by considering whether the procedural error resulted in a loss of educational opportunity or significantly restricted parental participation in the IEP formation. IDEA procedural error may be held harmless in appropriate cases, and this may include cases involving a mistake in how the IEP team was constituted. Although Judge Clifton in dissent and I in concurrence agree on the rejection of structural error and on the standard for assessing harmless error, we reach different conclusions in the application of the governing standard.[1] We both agree that the harmless error assessment turns here on whether there was a "loss of educational opportunity" for M.L. Applying this correct test for harmless error, I further conclude that the error in composition of the IEP

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[1] Judge Clifton's dissent states:

> Finally, I agree with Judge Gould, as expressed in Section I of his opinion, that a structural error analysis is not supported by our caselaw and has no place in the IDEA context. As Judge Gould correctly observes, a procedural violation constitutes a denial of a free and appropriate public education only when it results in a lost educational opportunity for the child or significantly restricts parental participation in formation of the IEP.

Dissent at 635.

Judge Clifton in his dissent concludes that the error in composition of the IEP team was harmless under the same standard I apply. Our differences turn in part on our disagreement on whether the assessment of loss of educational opportunity is a question of fact to be reviewed for clear error, or a mixed question of fact and law, to be reviewed de novo, as can be seen from a comparative review of our opinions, which apply the same standard but reach contrary results.

team, under the circumstances of this case, caused a violation of the IDEA and requires reversal of the district court's order granting summary judgment.

In Section I, I explain what I believe to be the controlling test for harmless error under our case law and why I believe a structural defect analysis is inapplicable in an IDEA context. In Section II, I apply the harmless error test to the facts in the record, and conclude that the procedural error in this case was not harmless. Hence, I concur in the judgment reached by Judge Alarcón, but not the structural error analysis that he advances.

I

A

In *Board of Education v. Rowley*, 458 U.S. 176, 206-207 (1982), the Supreme Court established a framework for IDEA review: "First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" In applying this standard, our cases (and those of our sister circuits) have not adopted a structural error approach. Instead, each case treats the procedural prong of *Rowley* as having two subparts: First, was there a procedural violation of the IDEA, and second, if there was error, did it affect the substantive rights of the plaintiff. *See* 28 U.S.C. § 2111 ("On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.").

The test for determining whether IDEA procedural error affects the substantial rights of the parties has been established by our prior precedent. In *W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23*, 960 F.2d 1479, 1484 (9th Cir. 1992) ("*Target Range*"), we stated: "Procedural flaws do not automatically require a finding of a denial of a FAPE. However, procedural inadequacies that result in the loss of educational opportunity, or seriously infringe the parents' opportunity to participate in the IEP formulation process, clearly result in the denial of a FAPE." *Id.* (internal citations omitted).[2] Our more recent cases follow the *Target Range* procedural error analysis. *See Shapiro v. Paradise Valley Unified Sch. Dist.*, 317 F.3d 1072, 1079-1080 (9th Cir. 2003) (quoting and applying the *Target Range* standard in holding that the omission of a child's parents and a teacher from her prior school were procedural violations in the creation and composition of her IEP team which amounted to the denial of a FAPE because they "resulted in the loss of educational opportunity for [the child]") *superseded on other grounds by* 20 U.S.C. § 1414(d)(1)(B); *Amanda J. v. Clark County Sch.*

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[2] In *Target Range*, we addressed whether omissions in the formulation of an IEP constituted the denial of a free appropriate public education ("FAPE"). The district court had held in favor of the plaintiff family, finding that the Target Range school district had failed to include important parties – the child's parents, regular education teacher, or a representative of the private school the child had also attended – in the IEP development. 960 F.2d at 1483-1484. We affirmed, holding that "Target Range clearly did not comply with the procedures required by the IDEA." *Id.* Our analysis elaborated that procedural errors do not amount to a *per se* denial of a FAPE, but, rather, that we will find that a FAPE has been denied where procedural inadequacies result in the "loss of educational opportunity," or when such errors "seriously infringe" parental ability to participate in the IEP process. *Id.* at 1484.

Dist., 267 F.3d 877, 891-892 (9th Cir. 2001) (applying the *Target Range* analysis to an "egregious" IDEA procedural error instead of granting automatic reversal). In sum, our precedents in *Target Range, Amanda J.*, and *Shapiro* establish that not all procedural violations by a school district in implementing the IDEA will necessarily result in the denial of a FAPE. Procedural error – including in M.L.'s case the omission of members of an IEP team – constitutes the denial of a FAPE only when it results in lost educational opportunity for the child, or when it significantly restricts parental participation in the IEP formation. *See Target Range*, 960 F.2d at 1484; *Shapiro*, 317 F.3d at 1079; *Amanda J.*, 267 F.3d at 892; *Ms. S. ex rel. G. v. Vashon Island Sch. Dist.*, 337 F.3d 1115, 1129 (9th Cir. 2003) *superseded on other grounds by* 20 U.S.C. § 1414(d)(1)(B).

B

Judge Alarcón characterizes the absence of a regular education teacher from M.L.'s IEP team as a "structural error" or a "structural defect" that is not subject to harmless error analysis. Judge Alarcón's Opinion at 612. In doing so, he extrapolates from the criminal context, where the Supreme Court has immunized certain errors that affect the constitutional rights of defendants from harmless error review. *See generally Arizona v. Fulminante*, 499 U.S. 279, 309-310 (1991); *Chapman v. California*, 386 U.S. 18, 22-24 (1967).[3]

[3] In support of his extension of this concept to our civil case, Judge Alarcón cites two 1979 cases external to our circuit addressing promotional evaluation boards in the United States Army, *Doyle v. United States*, 599 F.2d 984 (Cl. Ct. 1979), and *Dilley v. Alexander*, 603 F.2d 914

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While one might in other contexts applaud a creative solution to a difficult case, I find this structural error analysis strikingly inapplicable in our civil case context, where we are asked to assess whether a school district has infringed a child's rights to education consistent with the IDEA. Even in the realm of constitutional error in criminal prosecutions, where life and liberty are at stake, the Court has made clear that the situations where we will find structural error requiring automatic reversal are a "very limited class of cases." *Johnson v. United States*, 520 U.S. 461, 468 (1997).[4] Structural errors are the "exception and not the rule," *Rose v. Clark*, 478 U.S. 570, 578 (1986), and "most constitutional errors can be harmless." *Fulminante*, 499 U.S. at 306.

(D.C. Cir. 1979). *Doyle* and *Dilley* analogized to the structural defect cases discussed in *Chapman*, holding that the omission of statutorily-mandated reserve officers from military boards evaluating reservists for promotion was a structural error which was *per se* prejudicial and precluded any subsequent harmless error review. *Doyle*, 599 F.2d at 995; *Dilley*, 603 F.2d at 921-924.

[4] In emphasizing the narrowness of this limited universe of structural defects warranting *per se* relief, the Supreme Court, in *Neder v. United States*, 527 U.S. 1, 8 (1999), cited key cases identifying such defects:

> *Johnson v. United States*, 520 U.S. 461, 468, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997) (citing *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (complete denial of counsel)); *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (biased trial judge); *Vasquez v. Hillery*, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986) (racial discrimination in selection of grand jury); *McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984) (denial of self-representation at trial); *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) (denial of public trial); *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) (defective reasonable doubt instruction).

Judge Alarcón cites no precedent applying structural error in civil cases in our circuit, and I have found none, nor has he cited any IDEA-specific cases in our circuit applying a structural error test to procedural error.[5] Moreover, Judge Alarcón does not cite any examples of IDEA structural error analysis from other circuits. In fact, our sister circuits have consistently rejected *per se* IDEA structural error arguments, and instead have adopted case-by-case, harmless error inquiries similar to our standard, which I have reviewed above.[6] Nor does the

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[5] The two Ninth Circuit cases cited by Judge Alarcón to define structural error both concern the constitutional rights of criminal defendants. *United States v. Recio*, 371 F.3d 1093, 1101 (9th Cir. 2004); *Rice v. Wood*, 77 F.3d 1138, 1141 (9th Cir. 1996). They are inapposite in this IDEA context.

[6] *Adam J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804, 812 (5th Cir. 2003) (citing *Target Range*, 960 F.2d at 1484, and holding that "even if the determination of [the child's] IEP was procedurally deficient in some respects, he has not established that any procedural deficiency resulted in a loss of educational opportunity or infringed his parents' opportunity to participate in the IEP process"); *DiBuo v. Bd. of Educ.*, 309 F.3d 184, 191 (4th Cir. 2002) (rejecting the argument that a procedural IDEA violation should constitute a *per se* denial of a FAPE); *MM v. Sch. Dist. of Greenville County*, 303 F.3d 523, 533 (4th Cir. 2002) (holding that "[w]hen such a procedural defect exists, we are obliged to assess whether it resulted in the loss of educational opportunity for the disabled child, or whether, on the other hand, it was a mere technical contravention of IDEA"); *T.S. v. Indep. Sch. Dist. No. 54*, 265 F.3d 1090, 1095 (10th Cir. 2001) ("Procedural defects alone do not constitute a violation of the right to a FAPE unless they result in the loss of educational opportunity."); *Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 765 (6th Cir. 2001) ("[A] procedural violation of the IDEA is not a *per se* denial of a FAPE; rather, a school district's failure to comply with the procedural requirements of the Act will constitute a denial of a FAPE only if such violation causes substantive harm to the child or his parents. . . . [P]rocedural violations that deprive an eligible student of an [IEP] or result in the loss of educational opportunity also will constitute a denial of a FAPE under the IDEA."); *Weiss v. Sch. Bd. of Hillsborough County*, 141 F.3d 990, 996 (11th Cir. 1998) ("For the

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structural error position in IDEA litigation find any support in the text or legislative history of the IDEA. In the absence of guidance from the Court or Congress, we should conclude that IDEA cases are subject to the general principle of harmless error that applies generally in civil and criminal law contexts. *See* 28 U.S.C. § 2111; Fed R. Crim. P. 52(a); Fed. R. Civ. P. 61.

Judge Alarcón's structural error analysis disclaims a general applicability and purports to be limited, advocating a *per se* rule of reversal only for the violation of one procedural requirement of the IDEA: 20 U.S.C. § 1414(d)(1)(B)(ii), the requirement that an IEP team include a regular classroom teacher. However, Judge Alarcón sets forth no persuasive qualitative distinction between § 1414(d)(1)(B)(ii) and the other procedural requirements of the IDEA, which too are

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[plaintiff family] to prove that [their child] was denied a FAPE, they must show harm to [the child] as a result of the alleged procedural violations. Violation of any of the procedures of the IDEA is not a *per se* violation of the Act."); *Heather S. v. Wisconsin,* 125 F.3d 1045, 1059 (7th Cir. 1997) (quoting the *Target Range* standard); *Indep. Sch. Dist. No. 283 v. S.D.,* 88 F.3d 556, 562 (8th Cir. 1996) ("An IEP should be set aside only if procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of educational benefits.") (internal quotation marks omitted); *Murphy v. Timberlane Reg. Sch. Dist.,* 22 F.3d 1186, 1196 (1st Cir. 1994) ("[N]ot every procedural irregularity gives rise to liability under the IDEA. Nevertheless, procedural inadequacies [that have] compromised the pupil's right to an appropriate education . . . or caused a deprivation of educational benefits are the stuff of successful IDEA actions.") (internal quotation marks omitted); *Hampton Sch. Dist. v. Dobrowolski,* 976 F.2d 48, 52-53 (1st Cir. 1992).

important.[7] Consequently, Judge Alarcón's opinion posits no necessary or logical stopping point prohibiting future courts from applying a structural error approach to virtually any IDEA procedural error. In my view, the best means by which to differentiate between such errors is to evaluate each one individually – as colored by each case's particular facts – and to apply a uniform standard that assesses lost educational opportunity or lost parental participation, not by adopting a *per se* rule that insulates a subset of errors from future review. It should not be forgotten that, in interpreting IDEA, we, like the school district, parents, and the advocates participating in administrative hearing and in the courts, are trying to determine what is best for a disabled child.

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[7] Judge Alarcón emphasizes that the 1997 IDEA amendments revised the language of this provision, changing the IEP team requirement from the current teacher, when general education is a real possibility, to both a regular classroom teacher and a special education teacher. Op. at 607; *compare* 20 U.S.C. § 1414(d)(1)(B) (2003), *with* 20 U.S.C. § 1401(a)(20) (1996). But the 1997 IDEA amendments were numerous and substantive, affecting the entire statutory scheme, and reworking several procedural requirements, including other aspects of the IEP process. *See generally* Dixie Snow Huefner, *The Individuals With Disabilities Education Act Amendments of 1997*, 122 Ed. L. Rep. 1103 (1998). Other "[m]ajor new requirements were added to the IEP section." *Id.* at 1112-15. We accounted for Congress's purpose and focus, when it amended the provision, by our holding that it had been violated, and by rejecting the school district's array of defensive arguments. Yet, there is nothing in the statute or its regulations from which to conclude that those changes necessitate that § 1414(d)(1)(B)(ii) have its own structural defect procedural error analysis, separate and apart from the analysis applied to the other equally important IDEA procedural requirements, and at odds with the general course of civil and even criminal law.

II

Accordingly, my analysis takes me back to where I commenced, applying the *Target Range* standard to determine whether the procedural error in IEP team composition amounted to denial of a FAPE by either excluding appropriate parental participation or causing a lost educational opportunity for the child. This case poses no genuine issue of whether a parent of M.L. was excluded from the IEP process,[8] and so the controlling issue becomes whether the failure to include a regular education teacher on the IEP team resulted in a "loss of educational opportunity" within the meaning of the test established in *Target Range*. I am persuaded that, under the total circumstances, M.L. lost an educational opportunity because the FWSD violated the procedural requirements of the IDEA by failing to include a participating regular education teacher on the IEP team.[9]

The statutory requirement that an IEP team for a disabled child who is or may be in regular education must

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[8] Appellants do not contend that the FWSD's procedural error significantly restricted their participation in the IEP process.

[9] We review de novo the district court's conclusions of law. *Gregory K. v. Longview Sch. Dist.*, 811 F.2d 1307, 1310 (9th Cir. 1987). Judge Clifton concludes that the question of harmless error is one of fact and that we review the district court's findings for clear error. Dissent at 642-43. His analysis must concede, however, that the district court did not "fram[e] [its] discussion in terms of 'loss of educational opportunity' " and that "the meaning of the phrase 'lost educational opportunity' " is a legal question. Dissent at 637, 642 n.4. For these reasons, the question of whether M.L. has "los[t] an educational opportunity" under the IDEA is a mixed question of law and fact which we review de novo. *Gregory K.*, 811 F.2d at 1310; *Target Range*, 960 F.2d at 1483 (holding that the issue of whether a proposed IEP constitutes a FAPE is a mixed question of law and fact that we review de novo).

include a regular education teacher is not merely technical. A regular education teacher may have insights or perspectives that aid the process of IEP formation. We need not say that error in composition of an IEP team is always prejudicial and invariably results in the denial of a FAPE. Rather, we should assess the circumstances of each case, and here the record demonstrates that the failure to include Ms. Ramsey or Ms. Wicks or any other regular education teacher on the participating IEP team deprived M.L. of an educational opportunity.

This conclusion is unmistakable for several reasons. First, there is the IDEA's statutory preference for mainstreaming. The IDEA favors mainstreaming the education of a disabled child to "the maximum extent appropriate" given the nature of the child's disability. 20 U.S.C. § 1412(a)(5)(A).[10] When mainstreaming is pursued with a disabled child, and the child's education proceeds in the "Least Restrictive Environment," as set forth in 20 U.S.C. § 1412(a)(5)(A), the crucial purposes and requirements of IDEA are realized: The disabled child receives the benefit of observing and working with those who are not disabled, which can provide the disabled child with both educational and non-academic benefits. Children who are not disabled are given the opportunity to become better acquainted with their disabled peers, which may help avoid stereotyping, lessen prejudice, and prepare all students to work together in society. Most importantly, mainstreaming is

[10] To better accomplish this goal and accommodate those disabled children who might require specialized tools and supplements, Congress mandated that a child could only be removed from the regular class environment when the "use of supplementary aids and services could not be achieved satisfactorily" in the regular educational environment. 20 U.S.C. § 1412(a)(5)(A).

the mechanism for fulfilling the statutory goal that the disabled child be educated in the least restrictive setting, which experience tells us is best for the child's development. *See e.g.*, Alan Gartner & Dorothy K. Lipsky, *Beyond Special Education: Toward a Quality System for All Students*, 57 Harv. Educ. Rev. 367, 375 (1987) (concluding that there is a "substantial and growing" body of evidence that supports the academic and emotional developmental value of mainstreaming). The parents of disabled children do not have to prove a regular education environment is best for their children; rather, it is the school district's burden to explain in the IEP the extent to which a child cannot participate in regular education activities. 20 U.S.C. § 1414(d)(1)(A)(iv).

Second, Ms. Wicks, M.L.'s prior regular education teacher, had written to the FWSD, informing the school district that M.L. had made "good progress" in her class, which was comprised of twelve non-disabled students and four or five with "special needs," and recommending that M.L. remain in regular education during his kindergarten year. Third, the FWSD had appointed a regular education teacher to the IEP team, but inexplicably went forward with the IEP planning meeting without that teacher's presence and participation. Fourth, M.L.'s past IEP and placement demonstrated that it was at least possible to conclude that M.L. could be placed in a regular education classroom.

I certainly recognize that M.L.'s education in a regular classroom poses serious challenges for him, for classmates, for instructors, and for administration. That is clear from the record before us. But under the totality of circumstances, we cannot readily conclude that the statutory violation in not having a regular education teacher participate on the IEP

team was harmless. To the contrary, there is a strong likelihood that mainstreaming opportunities for M.L. would have been better considered had a regular education teacher taken part in the program's preparation, and that more mainstreaming might have been permitted for M.L. under the IEP. Hence, I do not believe that we can properly hold that the error in IEP team composition here was harmless.

Because I conclude on this record that we must hold that the FWSD's IEP process caused a "loss of educational opportunity," and the district court's conclusion was error,[11] I need not reach the second step in the *Rowley* analysis, i.e., whether the IEP was "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 207; *see also* 28 U.S.C. § 2111 (providing that "[o]n the hearing of any appeal . . . in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties").[12]

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[11] I reach this conclusion initially on my premise that the issue is a mixed question of fact and law, not predominantly factual in light of the IDEA's statutory preference for mainstreaming; but even if I were to view this issue under the "clear error" standard, I would still conclude that the district court's grant of summary judgment on the theory that there was no lost educational opportunity was reversible error.

[12] The dissent concludes that we must affirm because the district court found "that the program developed by the IEP team was the best placement for M.L., because it maximized the academic and nonacademic benefits available to him." Dissent at page 637. But, the district court made its findings regarding whether the IEP was reasonably calculated to enable the child to receive educational benefits without the benefit of the views and expertise of a regular classroom teacher having been expressed at the critical IEP team meeting to discuss M.L. The IDEA mandates that a regular classroom teacher be a member of the IEP team. Although I do not think a *per se* reversal follows from a

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CLIFTON, Circuit Judge, dissenting:

I agree with my colleagues on many of the important issues in this case. In particular, I join in Sections I, II-A, II-C,[1] and III of Judge Alarcón's opinion, and in Section I of Judge Gould's opinion. In English, that means that I agree with both Judge Alarcón and Judge Gould that the school district should have included a regular classroom teacher on the IEP team and that the failure to do so constituted a procedural violation of the IDEA. I also agree with my colleagues that the school district's procedural error did not prevent M.L.'s parents from participating in the formation of the IEP. To the extent that M.L.'s parents enjoyed limited participation it was because the parents voluntarily removed themselves from the process. Finally, I agree with Judge Gould, as expressed in Section I of his

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violation under our precedent, there is no doubt that the inclusion of a regular education teacher on the IEP team promotes the purposes of the IDEA. We ought not to speculate here that noncompliance with the procedural standards mandated in the IDEA did not matter. Because the failure of the school district to include a regular classroom teacher on the IEP team, conjoined with the other circumstances reviewed above that made regular education for M.L. a distinct possibility, we cannot say the error was harmless. For these reasons, and because of my disagreement on the standard of review, *see supra* notes 9 and 11, I cannot agree with my dissenting colleague's conclusion that if a regular classroom teacher had participated on the IEP team "there was [not] a realistic possibility that it would have resulted in a different assignment for M.L." Dissent at page 646.

[1] To be precise, while I agree with the main point of Section II-C, which is that the school district violated the procedural requirements of the IDEA, I do not join in the last sentence of that section. In that sentence Judge Alarcón applies the "structural defect" analysis contained in Section II-B of his opinion to reach the conclusion that the district court's judgment must be reversed. I disagree with both the structural defect approach and the conclusion. Nor do I join in the footnote accompanying that sentence.

opinion, that a structural error analysis is not supported by our caselaw and has no place in the IDEA context. As Judge Gould correctly observes, a procedural violation constitutes a denial of a free and appropriate public education only when it results in a lost educational opportunity for the child or significantly restricts parental participation in formation of the IEP.

I part with my colleagues in the application of these principles to this case, however, and reach a different conclusion. Specifically, I conclude that the failure to include a regular classroom teacher on the IEP team did not result in the loss of an educational opportunity for M.L. or deny him a free appropriate public education. Accordingly, I respectfully dissent.

Both of my colleagues focus on Plaintiffs' challenge to the procedures employed by the school district, which was the issue that Plaintiffs emphasized on appeal. The district court apparently concluded that the IDEA did not require the IEP team to include a regular classroom teacher, a view that all three of us on this panel agree was incorrect. The district court did not rely only on that erroneous legal conclusion to support its decision, however. Perhaps recognizing that it was a close question, the district court observed that "even if" the failure to include a regular classroom teacher amounted to a procedural violation, "such a violation would not necessarily constitute the denial of a FAPE." The district court relied on *W.G. v. Board of Trustees of Target Range School District*, 960 F.2d 1479, 1484 (9th Cir. 1992), and *Amanda J. v. Clark County School District*, 267 F.3d 877, 892 (9th Cir. 2001) – the same cases cited in my colleagues' opinions – and determined that "the question whether the alleged procedural violation amounted to the denial of a FAPE

depends on whether or not M.L. suffered a substantive loss of educational opportunity." That is essentially the same legal standard adopted by a majority of our panel (consisting of Judge Gould and me), as expressed in Section I of Judge Gould's opinion. In large part, it appears, because of the way the case was framed in the arguments made by the parties, the district court went on to address that question using somewhat different terminology. Nonetheless, the district court made factual findings that point to the conclusion that M.L. did not suffer a substantive loss of educational opportunity. I agree with the district court's findings and reach the same conclusion.

Plaintiffs vigorously argued to the district court that the school district had violated the substantive requirements of the IDEA, as well as its procedural requirements. A substantive violation alleged by Plaintiffs was that the school district had failed to "mainstream" M.L. to the maximum extent possible. The plan that the IEP team prepared for M.L. did not provide for placement in a "regular" or "integrated" kindergarten classroom, as his parents wanted, but in a "self-contained" classroom with other disabled and special education students. The district court reviewed the IEP team's plan and discussed Plaintiffs' substantive objections to it. While not framing that discussion in terms of a "loss of educational opportunity," the district court made detailed findings of fact to the effect that the program developed by the IEP team was the best placement for M.L., because that placement maximized the academic and non-academic benefits available to him.

The district court's factual findings are enlightening:

> M.L. could hope to gain little academic benefit from a placement in a regular kindergarten classroom focused on developing reading skills. As the District points out, M.L. is almost completely non-verbal. He has virtually no communication skills, and at the time of his evaluation he was not yet toilet trained. His cognitive ability places him at the first percentile level on the Battelle Developmental Inventory. . . . [A] kindergarten classroom geared toward teaching children reading skills is a very different environment from preschool.
>
> The District's experts at the due process hearing uniformly identified the special education placement at Wildwood Elementary as the superior option, and Petitioners offered no expert testimony in rebuttal.
>
> The administrative law judge found that in a regular classroom environment M.L. would interact primarily with his one-on-one aide as opposed to his peers. . . . M.L. lacks the independent skills necessary even to socialize with other children in an integrated classroom setting. . . . The Wildwood special education placement . . . offers the best of both worlds; it teaches children with M.L.'s challenges to function without the constant presence of an adult, and it also offers mainstreaming opportunities throughout the week that provide opportunities for socialization with non-handicapped children. The expert testimony in this case is unanimous that Wildwood is the least restrictive option for M.L.

> The Court finds no significant non-academic benefit to M.L. from a regular classroom placement.
>
> [T]he Court must . . . find that M.L.'s disruptive presence in the classroom would likely impair the education of the normally developing children.
>
> On balance, the Court cannot find that the District failed to mainstream M.L. to the maximum extent possible in developing his IEP.

The district court's factual findings are consistent with those of the administrative law judge in the due process hearing.[2] Her 73-page Findings of Fact, Conclusions of Law, and Order thoroughly supports the district court's conclusion. Specifically, the administrative law judge found:

> [T]he evidence establishes that [M.L.] has no expected opportunity for making meaningful academic progress in the . . . regular education kindergarten classroom. . . . While some autistic children do well in an integrated classroom if they have high skill levels and can attend to directions, the overwhelming evidence establishes that [M.L.] has difficulty attending to directions, has very low skill levels across all domains, and had difficulty making transitions and learning routines. Therefore, [M.L.'s] educational opportunities in a self-contained classroom are better than those in a [regular] classroom.

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[2] Plaintiffs did not introduce new evidence in district court. The record before the district court (and before us) was the same record that was before the administrative law judge.

> The level of support[] that [M.L.] needs will interfere with his ability to make non-academic progress in a regular education environment, even with a trained staff assistant. [M.L.] will be dependent on his assistant, which means he will have less opportunity to interact with peers. His day will be spent interacting with the adult assistant and not his peers. Therefore, placement in a general education classroom may in fact be more restrictive than a self-contained classroom.
>
> The evidence establishes that the self-contained classroom at Wildwood will provide [M.L.] with opportunities for socialization and modeling of peers with normal behaviors and communications skills.
>
> Here, the evidence establishes that [M.L.] has extremely disruptive behaviors and must be monitored constantly by a 1:1 aide.... Until [M.L.] is able to increase and generalize his receptive and expressive communication skills, and is able to attend to adult directions, he will continue displaying behaviors such as whining, crying, biting, pulling on others, scratching, laying down on the floor and throwing fits. Although this behavior would be addressed by his 1:1 aide, it would nonetheless be distracting to the teacher and the other students.

The findings by district court and by the administrative law judge constitute a factual determination that the program developed by the IEP team was the best placement for M.L. because the academic and non-academic benefits to M.L. were maximized by placement in a self-contained classroom, rather than a regular kindergarten classroom. The evidence supporting that conclusion was overwhelming. This factual determination necessarily

means that, even though the IEP plan for M.L. was prepared through a procedurally flawed process, the plan prepared by that team did not result in a loss of educational opportunity for M.L.

It is important to recognize that the district court did not simply determine that Plaintiffs failed to state a substantive violation of the IDEA. The statute requires only that a disabled student be given an "appropriate" education. There is no substantive mandate that a school district provide the best program possible. As the Supreme Court observed in *Board of Education v. Rowley*, 458 U.S. 176 (1982), the statute contains "elaborate and highly specific procedural safeguards" but only "general and somewhat imprecise substantive admonitions." 458 U.S. at 205. Thus, in reviewing actions brought under the statute, courts are instructed to make a twofold inquiry:

> First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

Id. at 206-07. The Court focused on procedure because "adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP." *Id.* at 206. Accordingly, if the process used to prepare an IEP was procedurally correct, the law does not require that the services "be sufficient to maximize each child's potential." *Id.* at 198. The program need only be "reasonably calculated to

enable the child to receive educational benefits." *Id.* at 207.

We have concluded that the process used to prepare the IEP for M.L. was not procedurally correct, so a tougher substantive standard should be applied. Our caselaw defines that tougher standard in terms of whether there has been a "loss of educational opportunity." The district court in this case also applied a tougher substantive standard. The district court not only concluded that the program prepared for M.L. was "reasonably calculated" to provide M.L. with a FAPE (the standard applicable in the absence of procedural error, under *Rowley*), but also that the plan was the *best* program for M.L. That being so, the district court properly held that even if there had been error in the composition of the IEP team, M.L. had not been denied a free appropriate public education.[3]

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[3] Judge Alarcón takes issue with my reliance on the district court's finding, not because he challenges the finding itself, but because he disagrees with my reliance upon that finding to conclude that the procedural error here was harmless. He criticizes my approach as being "at odds with" the two-step inquiry set forth in Supreme Court's decision in *Rowley* (and quoted in the text above), arguing that I have jumped to the substantive second step in order to circumvent the procedural first step. *Ante* at 619 n.9. I respectfully disagree. I give the same answer to the first *Rowley* question as both of my colleagues do: no, the school district has not complied with the procedures set forth in the Act. But *Rowley* does not say what happens when the answer to the first question is "no." Our court has previously held, and a majority of this panel holds again here, that a procedural error violates the Act only when it results in a lost educational opportunity for the child. There is nothing in *Rowley* which precludes consideration of the substantive impact on the child in determining whether there has been a lost educational opportunity due to a procedural error. Nor does my approach involve the second *Rowley* question. Instead, the district court applied what I described above as a "tougher substantive standard." The second question under *Rowley* asks only whether the program was

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Our caselaw tells us that not all procedural errors amount to violations of the statute. Rather, only a procedural error that results in a lost educational opportunity violates the law. In my view, the factual findings of the district court demonstrate that M.L. did not suffer a lost educational opportunity. The program outlined by the IEP would have maximized both the academic and non-academic benefits for him, would have mainstreamed him to the maximum extent possible, and was uniformly identified by the experts who testified as superior to the regular classroom placement that M.L.'s parents sought. The statute does not require anything more than that. Even if the process leading to the program was deficient, the program itself was not, and thus the student was not injured – M.L. did not lose an educational opportunity. The IDEA should not be interpreted to impose liability on a school that seeks to provide the best possible program.

The clearly erroneous standard applies to a district court's findings of fact in IDEA cases where, as here, the decision below relied on a written administrative record.[4]

"reasonably calculated" to enable the child to receive educational benefits. The district court went beyond that here to find something more, that the proposed plan was the best program for M.L. That finding relates to the second step of *Rowley* in that it considers the *substantive* impact on the child rather than the *procedural* process employed to create the plan, but it is not the same inquiry.

[4] Judge Gould maintains, at 631 n.9, that "the question of whether M.L. has 'los[t] an educational opportunity' under the IDEA is a mixed question of law and fact which we review de novo." (citing *Gregory K.*, 811 F.2d at 1310; *Target Range*, 960 F.2d at 1482) (alteration in original). Our caselaw, however, provides only that the broad substantive issue – "whether the school district's proposed IEP was a free appropriate public education" – is a mixed question of fact and law that is reviewed de novo. *Gregory K.*, 811 F.2d at 1310; *accord Target Range*, 960 F.2d at 1482 (internal quotation marks omitted).

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Gregory K. v. Longview Sch. Dist., 811 F.2d 1307, 1310 (9th Cir. 1987). For a factual finding to be considered "clearly erroneous," we must be left with the "definite and firm conviction that a mistake has been committed." *Amanda J.*, 267 F.3d at 887.

In applying the "loss of educational opportunity" standard to the facts of this case, Judge Gould's opinion does not challenge any of the district court's factual findings, let alone explain how those factual findings are "clearly erroneous." Instead, Judge Gould offers one legal reason and three factual reasons for reversing the district court. I am not persuaded.

The first reason is the statutory preference for mainstreaming to "the maximum extent appropriate." Opinion of Judge Gould, at 632 (quoting 20 U.S.C. § 1412(a)(5)(A)).

The question before us is more limited: whether the procedural error at issue caused a loss of educational opportunity for M.L. That question is primarily a factual one. It requires consideration of M.L.'s physical and cognitive limitations, the placements proposed in the challenged IEP, the alternative placements, and the expert testimony and other evidence regarding the appropriate placement for M.L. The only legal component is the meaning of the phrase "a lost educational opportunity." The marked predominance of factual over legal issues in our inquiry is confirmed by the relevant portion of Judge Gould's opinion, Section II, which, in five pages of analysis, makes three factual arguments, just one legal argument, and does not cite to a single case, other than for the standard of review. Where a mixed question of law and fact is primarily factual in nature, we apply the clearly erroneous standard of review. *Amanda J.*, 267 F.3d at 887.

The relevant finding of the district court is even narrower than that. The district court found that the placement recommended by the IEP team was the best placement for M.L. That is a purely factual determination, not a legal one or a mixed law and fact question. Thus, it should be subject to clear error review.

Judge Gould builds on the statutory preference for mainstreaming, "when feasible," by highlighting, at 632-33, the benefits of placing disabled students in regular education settings. As the district court's order expressly stated, however, the "expert testimony in this case is unanimous that Wildwood [special education placement] is the least restrictive option for M.L." Given the entirely one-sided expert testimony regarding the appropriate placement of M.L., the district court was not wrong in concluding that the district did "mainstream M.L. to the maximum extent possible in developing his IEP." Judge Gould does not explain why the district court's detailed discussion of mainstreaming is clearly erroneous or in error under any standard of review. Nor does Judge Gould identify his reasons for believing that the IEP prepared by the school district failed to mainstream M.L. "to the maximum extent feasible." The naked observation that mainstreaming is preferred and can be beneficial to disabled children does not mean that it is right for every single child. The findings of the district court deal with M.L. and cite unanimous expert testimony that mainstreaming for that child was not appropriate under the circumstances.

The second reason given by Judge Gould is that M.L.'s preschool teacher in the Tukwila School District, Ms. Wicks, informed the school district that M.L. had made "good progress" in her class and recommended that M.L. remain in a regular education classroom during his kindergarten year. Opinion of Judge Gould, at 633. Both the district court and the administrative law judge were aware of and considered Ms. Wicks' recommendation, as did the IEP team and the school district. Notwithstanding Ms. Wicks' recommendation, the district court and the administrative law judge both found, as a factual matter, that

M.L. would be better served by the IEP prepared by the district. As the administrative law judge observed, even Ms. Wicks "admitted that she did not expect [M.L.] to achieve much academic success in a mainstream placement." And she also recognized that a regular classroom placement would not work for M.L. much longer, since, as noted by the administrative law judge, "in her opinion, the only option [M.L.] would have after one year in an integrated kindergarten would be placement in a self-contained classroom for at least part of the day and mainstream[ing] during non-academic activities." Ms. Wicks' recommendation is not nearly strong enough to support a conclusion that the district court was clearly erroneous in finding, as the administrative law judge had found, that a self-contained classroom presented the better kindergarten placement for M.L.[5] It is surely not the case that a prior preschool teacher's recommendation is determinative and binding on the school district.[6]

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[5] Among other factors, I note that Ms. Wicks' recommendation for a regular kindergarten classroom placement was first made before M.L. moved with his family to the Federal Way School District. It is not surprising that the IEP team would take into account what happened during the week M.L. that [sic] subsequently spent in Ms. Ramsey's regular kindergarten classroom. As described in Judge Alarcón's opinion, at 596-97, and more extensively developed in the record, that week in a regular classroom setting was not a positive experience for M.L. or anyone else involved.

[6] It is important to note the procedural posture of this case. We are not sitting in review of an ordinary summary judgment ruling, where we scour the record for disputed issues of material fact. If that were the posture, Ms. Wicks' recommendation might suffice to create a genuine issue of material fact. But here, we are asked to determine whether the district court erred in finding that M.L.'s IEP maximized his educational opportunities. Unless Ms. Wicks' recommendation outweighed the mountain of contrary evidence, including the unanimous expert testimony, we should affirm the district court.

The third reason identified by Judge Gould, at 633, is simply the fact of the procedural violation: the failure to include a regular classroom teacher in the IEP planning meeting. But the fact that there was a procedural violation says nothing about whether that violation had a substantive impact; it is simply the reason for asking the question. Judge Gould properly rejects the per se rule applied by Judge Alarcón and recognizes that our caselaw establishes that not all procedural violations result in the denial of a FAPE. The fact of the procedural violation is not a fact indicating that M.L. actually lost an educational opportunity as a result.

The final reason given by Judge Gould, at 633, is that "M.L.'s past IEP and placement demonstrated that it was at least possible to conclude that M.L. could be placed in a regular education classroom." Anything is possible, but it is highly unlikely that including a regular classroom teacher on the IEP team would have resulted in a recommendation that M.L. be placed in a regular kindergarten classroom, as I will explain below. More importantly, as the district court found, such a placement would not have been the best placement for M.L. In being denied such a placement, he did not lose an educational opportunity. In broader terms, by proposing a placement which would have better served his needs, the school district did not fail to provide him with a free appropriate public education, the primary requirement of the IDEA.

The principal aim of the statute is to improve the education provided to the affected children. *See* 20 U.S.C. § 1400(c)(1) ("Improving educational results for children with disabilities is an essential element of our national policy. . . ."). That goal is not served by satisfying the parents' desire for a placement which would not have

maximized the benefits for the child. The law could have been written to give parents of a disabled child absolute power over the placement decision, but it was not. Certainly parents should play an important role and must be included within the process, and that is a key part of the procedural obligation imposed by IDEA. But IDEA does not and should not impose liability on a school when the IEP provides for the best program for the student, though his parents want a different placement. Even if there was procedural error in preparing this IEP, the student here was not harmed.

If we need to consider what would have happened if a regular classroom teacher had participated on the IEP team, I do not think that there was a realistic possibility that it would have resulted in a different assignment for M.L. If a regular classroom teacher had been present, that teacher along with the rest of the IEP team would necessarily have considered what happened during the five days that M.L. was in Ms. Ramsey's regular kindergarten class in the Federal Way district. An instructional assistant was assigned to M.L. on a one-on-one basis because his needs were so great that he could not be dealt with as part of the class as a whole. There was a different instructional assistant every day, because each one quit after a single day. M.L. was allowed to listen to his favorite music through headphones while in class, to keep him under control, which meant that his involvement with the rest of the class was limited at best. Though M.L.'s mother thought that M.L. was teased by other students, she acknowledged herself that M.L. did not appear to be aware of it, because he had his headphones on most of the time. After five days, the mother removed M.L. from the classroom and refused to return. With that history, the proposition that Ms. Ramsey

or any other regular classroom teacher would have attempted to persuade the other IEP team members to place M.L. in another regular kindergarten classroom is dubious.

It is even more unlikely that any such person would have succeeded in persuading the other members of the IEP team. The regular classroom teacher would not have been the final decisionmaker. That teacher – be it Ms. Rowley, Ms. Wicks, or someone else – would have been only one member of the team. And the team had much more to go on than just the reports of M.L.'s previous teachers. Prior to the IEP team meeting, the district formed a separate multidisciplinary team, including a school psychologist, a speech and language pathologist, a certified occupational therapist, and M.L.'s mother, to evaluate the student. That team also recommended placement in a special education program tailored to M.L.'s needs, rather than in a regular kindergarten classroom. That recommendation matches the *unanimous* judgment of all the experts presented to the administrative law judge and the district court. Under those circumstances, it was not reasonably possible that including a regular classroom teacher in the IEP team meeting would have resulted in an IEP that placed M.L. in a regular education classroom during his kindergarten year.

My colleagues are hesitant to shrug off lightly the procedural error made here and understandably so. The procedural safeguards of the IDEA are important and should be followed in all cases. But in light of the overwhelming evidence that the self-contained placement maximized the academic and non-academic benefits for M.L., I cannot agree that the district court's factual findings were erroneous. Nor can I disagree with the

conclusion of the district court that the school district did not deny M.L. a free appropriate public education. Accordingly, I respectfully dissent.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

M.L., a minor; C.D., his parent;
S.L., his parent,

Petitioners-Appellants,

v.

FEDERAL WAY SCHOOL DISTRICT;
WASHINGTON SUPERINTENDENT
OF PUBLIC INSTRUCTION,

Respondents-Appellees.

No. 02-35547

D.C. No.
CV-01-00899-JCC

OPINION

Appeal from the United States District Court
for the Western District of Washington
John C. Coughenour, Chief Judge, Presiding

Argued and Submitted
August 7, 2003 – Seattle, Washington

Filed November 5, 2004

Before: Arthur L. Alarcón, Ronald M. Gould, and
Richard R. Clifton, Circuit Judges.

Opinion by Judge Alarcón;
Concurrence by Judge Gould;
Dissent by Judge Clifton

COUNSEL

James E. Lobsenz, Carney Badley Spellman, P.S., Seattle, Washington, for the petitioners-appellants.

Christopher L. Hirst, Preston Gates & Ellis LLP, Seattle, Washington; James J. Dionne, Dionne & Rorick, Seattle, Washington, for the respondents-appellees.

OPINION

ALARCÓN, Senior Circuit Judge:

M.L., a minor, C.D., his mother, and S.L., his father, appeal from the order granting the motions for summary judgment filed by Appellees, the Federal Way School District ("FWSD") and the Washington Superintendent of Public Instruction.[1] They contend, inter alia, that the failure of the FWSD to include a regular education teacher on the team that prepared M.L.'s individualized education program ("IEP") rendered the IEP invalid.

I am persuaded that we must reverse the order granting summary judgment because the failure of the FWSD to include a regular education teacher on the IEP team significantly deviated from the procedural requirements of the Individuals with Disabilities Education Act ("IDEA") that *at least one* regular education teacher be included in the development of an IEP for a student with a disability pursuant to 20 U.S.C. § 1414(d)(1)(B)(ii). This critical structural defect in the constitution of the IEP team precludes us from considering whether the IEP

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[1] The complaint in this matter named the Washington Superintendent of Public Instruction ("SPI") as a party to this action. The district court granted summary judgment in favor of the SPI on the basis that the claim was "premature." While the notice of appeal refers to the order granting summary judgment to "respondent," the Appellants have not raised any issue challenging the merits of the summary judgment order in favor of the SPI. Thus, it would appear that the Appellants have abandoned their appeal regarding the SPI.

developed without the inclusion of at least one regular education teacher was reasonably calculated to enable M.L. to receive a free and appropriate public education ("FAPE"). I believe we must vacate the judgment and remand with instructions that the district court enter an order directing the FWSD to select an IEP team that complies with the procedural requirements of the IDEA.

Judge Gould has filed a separate concurring opinion in which he joins me in concluding that the omission of a regular classroom teacher from M.L.'s IEP team was a procedural error and that we must reverse the district court's order granting a summary judgment. Judge Gould has applied the harmless error standard of review, instead of the structural defect analysis I have employed, in concluding that the judgment must be reversed.

In his dissent, Judge Clifton agrees with Judge Gould that the harmless error test must be applied in this matter, but concludes that the school district's error in failing to include a regular classroom teacher on the IEP team, as required by the IDEA, was harmless error, and did not result in the loss of an educational opportunity for M.L., or deny him a free appropriate public education.

I

Unless otherwise indicated, the facts are undisputed. M.L. was born on November 13, 1994. He suffers from autism, mental retardation, and macrocephaly.[2] As of

[2] Macrocephaly is a condition that causes the distance around the widest part of the skull to be greater than expected for the age and background of the child.

February 2001, he was globally delayed across all developmental domains consistent with his cognitive level, and displayed significant behavioral problems. M.L. was almost completely nonverbal, had virtually no communication skills, was not toilet trained, and had a cognitive ability that placed him in the first percentile on the Battelle Developmental Inventory.[3]

Dr. Ilene Schwarz, an expert regarding educational practices for children with autism, indicated that M.L. might be able to perform tasks with a familiar service provider, but would be unable to demonstrate those skills when asked to do so in another environment. M.L. had made gains in physical therapy between 1997 and 2000. The progress reports from Puget Sound Therapy Services indicate, however, that as of August 2000, M.L. frequently had temper tantrums and displayed aggressive behavior such as hitting and pinching, which interfered with his performance in therapy. M.L.'s occupational therapist recommended that M.L. would benefit from a more structured environment.

M.L. was enrolled in the Tukwila Preschool at the Riverton Park United Methodist Church in the Tukwila School District in November 1997. He attended preschool four days per week for approximately two hours per day for three years. Except for a few months in his third year, M.L. was continuously assigned to Jodie Wicks's integrated

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[3] The Battelle Developmental Inventory Screening Test is administered to children six months to eight years old and includes subtests which measure fine and gross motor, adaptive, personal-social, receptive and expressive language, and cognitive skills.

preschool class until June 2000.[4] The class followed the same routine each day, using the same songs and activities. Each year the class also included several of the same students and the same instructional assistants.

M.L.'s skills improved over the course of his three years in Ms. Wicks's preschool class. M.L. began to interact more frequently with other children and participated, to a limited extent, in classroom activities. M.L. was teased a few times while enrolled there. During the three years he was enrolled in Ms. Wicks's class, he was assigned a one-on-one instructional assistant who remained with him throughout the day.

M.L. displayed increasingly aggressive behavior during that time. This conduct was documented by many of his service providers. His level of aggression escalated when he was frustrated or given more challenging tasks. He would cry, whine, or bite and scratch his instructional assistant. He mouthed many objects and on at least one occasion bit another child. Lai Doo, M.L.'s in-home therapist, testified that as M.L.'s level of communication increased, his level of aggression decreased. However, Ms. Doo also stated that M.L.'s "level of aggression seem[ed] to be a lot more severe than the others that [she had] seen."

Because M.L. is disabled, the Tukwila School District was required by 20 U.S.C. § 1414(d)(1)(A) to create an IEP each year that stated M.L.'s "present levels of educational performance," outlined the "special education and related services . . . to be provided to [M.L.]," and set forth

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[4] An "integrated" or "regular" classroom consists of both typically developing children and a small number of disabled children. They are taught by a "regular education" teacher.

"measurable annual goals." On January 31, 2000, the Tukwila School District's IEP team prepared an IEP for M.L.'s initial placement for the 2000-2001 academic year ("Tukwila IEP"). Ms. Wicks, M.L.'s preschool teacher, was a member of the IEP team. The IEP provided that M.L. was to be enrolled in September 2000 in an integrated kindergarten class for 130 minutes, four times per week, and was to receive additional therapy and instructional services.

Prior to M.L.'s enrollment in an integrated kindergarten class in the Tukwila School District, M.L. and his family moved to the FWSD on or about July 30, 2000. M.L. was enrolled at the Mark Twain Elementary School in the FWSD. The FWSD implemented the Tukwila IEP for M.L. until it was due to expire on September 30, 2000. Accordingly, M.L. was placed in Sandy Ramsey's integrated kindergarten class in the Mark Twain Elementary School. Ms. Ramsey is certified as a regular and special education teacher.

At C.D.'s suggestion, Ms. Ramsey controlled M.L.'s behavior in class by letting him listen to his favorite music on his headphones. The FWSD hired a series of one-on-one instructional assistants to work with M.L. Each of them quit after working with him for one day.

C.D. attended class with M.L. during the five days that M.L. was enrolled at the Mark Twain Elementary School. On September 5, 2000, C.D. witnessed two boys teasing M.L. She discussed this incident with Ms. Ramsey and Pat Warden, Ms. Ramsey's classroom assistant. Ms. Ramsey responded that she "would make a note and make it a priority to keep observing – keep an eye on these children and a better eye on [M.L.] to see if anything continued to happen so she could address any incidents

that might happen." On September 6, 2000, C.D. observed more children teasing M.L. at recess. She reported this conduct to Ms. Ramsey and Ms. Warden. C.D. later testified, however, that M.L. was "happy as a little lark" during recess.

On September 7, 2000, C.D. again observed children teasing M.L. at recess and during class time. She discussed this conduct with Ms. Ramsey. Ms. Ramsey told C.D. that she "had not witnessed any teasing of M.L. during class, but would continue to watch for it and intervene if necessary." Ms. Ramsey informed C.D. that "policies were in place regarding teasing and that she did not allow such behavior in her class."

C.D. witnessed additional teasing incidents on September 8 and September 11, 2000. She reported these events to Ms. Ramsey. Ms. Ramsey replied that "she would keep an eye on [M.L.] and would take care of it." Ms. Ramsey did not take any action regarding the teasing incidents. C.D. testified that there was no evidence that M.L. was actually affected by the teasing and that "because he had his headphones on most of the time he was being teased . . . [she] didn't know if he even heard it."

On September 12, 2000, C.D. called Diane Niksich-Conn, the Vice-Principal of the Mark Twain Elementary School, to report a teasing incident that had occurred the previous day. Vice-Principal Niksich-Conn suggested that C.D. contact Ms. Ramsey. Ms. Niksich-Conn then contacted Ms. Ramsey and advised her to talk to C.D.

On September 13, 2000, Ms. Ramsey telephoned C.D. to discuss her complaint that M.L. had been teased on September 11, 2000. Ms. Ramsey informed C.D. that the teasing that took place on September 11, 2000 was the

only incident that she had observed. Ms. Ramsey testified that during that conversation, she requested that C.D. give her an opportunity to stop the teasing of M.L. by other children before C.D. took the matter further. M.L. did not return to the Mark Twain Elementary School after September 11, 2000. C.D. did not speak with the FWSD administrator before removing her child from the school.

On or about September 17, 2000, the FWSD offered to place M.L. at the Wildwood Elementary School in a self-contained classroom[5] taught by Teresa Thomas, a certified special education teacher with experience teaching autistic children. C.D. refused to enroll M.L. in the Wildwood Elementary School because she believed that a self-contained classroom would not provide for sufficient participation with regular education students. She thought that "it could be potentially dangerous for [M.L.]" to interact with the other students in the self-contained classroom. C.D. did not visit Ms. Thomas's classroom at any time.

After the Tukwila IEP expired on September 30, 2000, a multidisciplinary team met on October 6, 2000, to determine whether M.L. should be provided special education services in the FWSD.[6] A school psychologist, a speech

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[5] A "self-contained" classroom consists of only disabled students.

[6] *See* 20 U.S.C. § 1414(a)(1)(A)-(B):

(1) Initial evaluations

(A) In general

A State educational agency, other State agency, or local educational agency shall conduct a full and individual initial evaluation, in accordance with this paragraph and subsection (b) of this section, before the initial provision of special education

(Continued on following page)

and language pathologist, an occupational therapist, and C.D. participated in the initial evaluation. No regular education teacher participated in this assessment. In addition to observing M.L. for two hours, and interviewing C.D., the initial evaluation consisted of extensive review of records from providers identified by C.D. and the Tukwila IEP. The school psychologist also interviewed Ms. Wicks.

The group produced a report ("Evaluation Report") that recommended that M.L. be placed in a special education program that offered a small class size, provided visual supports, and predictable and consistent schedules and routines. On or about October 25, 2000, Dr. Sarah Drinkwater, FWSD's director of student support services, offered to place M.L. at the Wildwood Elementary School, the Mark Twain Elementary School, or several other schools within the FWSD. C.D. rejected each of these suggestions. On October 27, 2000, Appellants filed a written objection to the Evaluation Report. They also requested that the FWSD provide for an independent evaluation of M.L. at public expense. In response, the FWSD filed a request for a due process hearing.

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and related services to a child with a disability under this subchapter.

(B) Procedures

Such initial evaluation shall consist of procedures –

(i) to determine whether a child is a child with a disability (as defined in section 1401(3) of this title); and

(ii) to determine the educational needs of such child.

On November 1, 2000, Dr. Lee Saffrey, a FWSD program specialist, mailed Appellants a letter proposing an IEP meeting for November 13, 2000 at 8:00 a.m. at the Wildwood Elementary School. C.D. faxed a letter to Dr. Saffrey on November 1, 2000, in which she stated that she would not attend any IEP meetings unless "the staff from[her] child's neighborhood school (Starlake Elementary)" were present and only if the meetings were held at the FWSD administration offices or the Starlake Elementary School. C.D. also indicated that she would be available to attend an IEP meeting on November 13, 2000 after 6:00 p.m. On November 2, 2000, Dr. Saffrey notified C.D. that the location of the meeting had been changed to the administrative offices of the FWSD and that the meeting would occur at 4:00 p.m. on November 13, 2000. Dr. Saffrey also informed C.D. that Sarah Sapronari, a regular education and special education teacher, would be a member of the IEP team.

On November 6, 2000, C.D. faxed a letter to the FWSD in which she stated that she would not be able to attend the proposed IEP meeting at 4:00 p.m. on November 13, 2000. She stated that she would be available between 4:15 a.m. and 5:15 a.m., or at 6:00 p.m. on any Tuesday, Wednesday, Thursday or Friday, and at 7:00 p.m. or later on Mondays. She also suggested meeting on Saturdays or Sundays. Dr. Saffrey notified C.D. that an IEP meeting could be conducted only during the day from 7:00 a.m. to 4:00 p.m. on any day Monday through Friday. Dr. Saffrey informed C.D. that she could also participate via a conference call. C.D. replied on November 9, 2000, that she would not be able to attend an IEP team meeting during the hours and days suggested by Dr. Saffrey, nor could she or her husband participate in a conference call on November 13, 2000.

The Administrative Law Judge ("ALJ") found that the assertion that M.L.'s parents could not attend the IEP meeting at 4:00 p.m. was not credible. S.L.'s time sheet records from his employer indicate that on November 13, 2000, his work-day ended at 2:58 p.m. At the hearing before the ALJ, C.D. testified that she was not able to attend the November 13, 2000 IEP team meeting at 4:00 p.m. or participate in a conference call because M.L. had an afternoon appointment on that day with Northwest Behavioral Associates. She stated she left home at 3:45 p.m. and did not return until 7:30 p.m. The ALJ found that this testimony was not credible. C.D.'s fax machine log reflected that C.D. sent a fax from her home on November 13, 2000 at 5:05 p.m. The cover sheet was in C.D.'s handwriting.

The FWSD IEP meeting was held on November 13, 2000, at 4:00 p.m. Appellants did not attend. Ms. Thomas, a certified special education teacher assigned to the Wildwood Elementary School, was a member of the IEP team. However, no regular education teacher participated in the IEP meeting or evaluated the facts to determine whether the IEP was reasonably calculated to provide M.L. with a FAPE.

A letter written by Ms. Wicks, M.L.'s preschool teacher, dated May 10, 2000, was considered by the IEP team. She stated in this letter that "[M.L.] has made good progress in this setting and exceptional gains in socialization." She recommended that M.L. "remain[] in a general education kindergarten classroom during his kindergarten year and that he continue to be supported by a one-on-one assistant."

After reviewing the Tukwila IEP, M.L.'s school records, and Ms. Wicks's recommendation, the FWSD IEP team concluded that M.L. "would do better in a smaller setting with the opportunity to work on specific skill

areas" and recommended placement in Ms. Thomas's self-contained classroom at the Wildwood Elementary School. The IEP provided for mainstreaming opportunities[7] during lunch, recess, assemblies, music, library, and school activities.

Ms. Thomas's curriculum incorporated specialized strategies for teaching autistic children. Ms. Thomas's self-contained classroom was smaller than an integrated kindergarten and was specially designed for students ranging from kindergarten through sixth grade.

The FWSD mailed a copy of the IEP to M.L.'s parents on November 17, 2000. Dr. Drinkwater also enclosed a letter offering M.L.'s parents the opportunity to discuss and refine the IEP. M.L.'s parents did not do so, but instead requested a due process hearing before an ALJ with the Department of Education.

In February 2001, an eight-day due process hearing regarding the appropriateness of the IEP was held before an ALJ pursuant to the IDEA. The ALJ found that "the District's evaluation team was appropriately constituted." The ALJ denied Appellants' motion for reconsideration.

Appellants sought review of the ALJ's decision before the United States District Court for the Western District of Washington pursuant to 20 U.S.C. § 1451(i)(2)(A). In their petition for judicial review and complaint, Appellants alleged, inter alia, that the FWSD failed to comply with the procedural safeguards provided for under 20 U.S.C.

[7] "Mainstreaming" is a term used to describe opportunities for disabled students to engage in activities with non-disabled students.

§§ 1400-15, 34 C.F.R. §§ 300.1-.556, and Washington state law.

Appellants filed a motion for partial summary judgment in which they alleged that the FWSD violated the procedural requirements of the IDEA by failing to include a regular education teacher on the IEP team. The FWSD filed a cross motion for summary judgment. The district court denied Appellants' partial motion for summary judgment and granted the FWSD's motion. The district court found that because M.L. was new to the school district, and not participating in regular education classes at the time the IEP meeting took place, "it [was] permissible to include only teachers [on the IEP team] who are likely to be entrusted with him in the new placement." The district court also stated: "Even if the Court were to find that the district's failure to include a regular education teacher of M.L.'s on the IEP team amounted to a procedural violation of the IDEA, such violation would not necessarily constitute the denial of a FAPE." Appellants filed a timely notice of appeal on May 29, 2002. The district court had jurisdiction pursuant to 20 U.S.C. § 1415(i)(2)(A). We have jurisdiction pursuant to 28 U.S.C. § 1291.[8]

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[8] The FWSD filed a motion with this court on December 24, 2002, requesting that we supplement the administrative record to include the testimony of Diane Niksich-Conn. In their supplemental letter brief, Appellants argue that normally a reviewing court will not supplement the record with material not considered by the district court. We have previously held, however, that "[i]n reviewing the record, this court must examine the administrative record as *a whole*. . . . " *Gonzalez v. Sullivan*, 914 F.2d 1197, 1200 (9th Cir. 1990) (emphasis added); *see also* 20 U.S.C. § 1415(i)(2)(B)(1) (stating that in reaching its decision, a reviewing court is required to "receive the records of the [state] administrative proceedings"). In addition, Rule 10(e) of the Federal

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II

A.

In this appeal, Appellants contend that the FWSD's failure to include a regular education teacher on the IEP team was a "significant violation" of the procedural requirements of the IDEA and renders the IEP invalid to ensure that a disabled child receives a FAPE. The FWSD argues in response that it did not violate the procedural requirements of the IDEA that at least one regular education teacher participate in evaluating the factors to be considered in the preparation of an IEP because three members of the team had "significant teaching experience." Appellees' Brief at 15. No authority was cited for this proposition. I construe this argument as a reluctant concession that at least one regular education teacher was not a member of the IEP team, as required by the IDEA. We review de novo whether a school district's proposed IEP provides a FAPE under the IDEA. *W.G. v. Bd. of Trustees,* 960 F.2d 1479, 1483 (9th Cir. 1992) (*"Target Range"*). We review a district court's findings of fact in an IDEA case for clear error. *Gregory K. v. Longview Sch. Dist.,* 811 F.2d 1307, 1310 (9th Cir. 1987).

Rules of Appellate Procedure allows the record to be corrected if "anything material to either party is omitted from or misstated in the record by error or accident."

It is clear that Ms. Niksich-Conn's testimony was erroneously omitted from the administrative record considered by the district court. Since we are required to consider the entire administrative record in determining whether the district court erred in determining the appropriateness of a special education placement, we grant the FWSD's motion to supplement the record.

The IDEA was enacted by Congress to assist state and local agencies financially in educating students with disabilities. *Ojai Unified Sch. Dist. v. Jackson,* 4 F.3d 1467, 1469 (9th Cir. 1993). Its goal is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living. . . . " 20 U.S.C. § 1400. The term "free appropriate public education" is defined as "special education and related services that . . . are provided in conformity with the individualized education program required under section 1414(d) of this title." 20 U.S.C. § 1401(8). The term "individualized education program" is defined in the IDEA as "a written statement for each child with a disability that is developed, reviewed, and revised in accordance with section 1414(d) of this title." 20 U.S.C. § 1401(11).

Section 1412(6)(A) provides that "[c]hildren with disabilities and their parents are afforded the procedural safeguards required by section 1415 of this title." 20 U.S.C. § 1412(6)(A). A state is required to "conduct a full and individual initial evaluation . . . before the initial provisions of special education and related services to a child." 20 U.S.C. § 1414(1)(A).

In § 1414(d)(1)(B), Congress set forth persons who must be included on an IEP team to evaluate a disabled student's special educational needs. The statute provides as follows:

> The term "individualized education program team" or "IEP Team" means a group of individuals composed of –

(i) the parents of a child with a disability;

(ii) at least one regular education teacher of such child (if the child is, or may be, participating in the regular education environment);

(iii) at least one special education teacher, or where appropriate, at least one special education provider of such child;

(iv) a representative of the local educational agency who –

(I) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;

(II) is knowledgeable about the general curriculum; and

(III) is knowledgeable about the availability of resources of the local educational agency;

(v) an individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in clauses (ii) through (vi);

(vi) at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and

> (vii) whenever appropriate, the child with a disability.

20 U.S.C. § 1414(d)(1)(B).

The IDEA also provides that "[t]he regular education teacher of the child, as a member of the IEP Team, shall, to the extent appropriate, participate in the review and revision of the IEP of the child." 20 U.S.C. § 1414(d)(4)(B). The regulations drafted to implement the IDEA contain the following provisions:

> The public agency shall ensure that the IEP team for each child with a disability includes –
>
> (1) The parents of the child;
>
> (2) At least one regular education teacher of the child (if the child is, or may be, participating in the regular education environment). . . .

34 C.F.R. § 300.344(a).

In Appendix A to Part 300 of Title 34, the following commentary explains the critical role of a regular education teacher in developing an IEP:

> Regular Education Teacher Participation in the Development, Review, and Revision of IEPs Very often, regular education teachers play a central role in the education of children with disabilities (H. Rep. No. 105-95, p. 103 (1997); S. Rep. No. 105-17, p. 23 (1997)) and have important expertise regarding the general curriculum and the general education environment. Further, with the emphasis on involvement and progress in the general curriculum added by the IDEA Amendments of 1997, regular education teachers have an increasingly critical role (together with

> special education and related services personnel) in implementing the program of FAPE for most children with disabilities, as described in their IEPs.
>
> Accordingly, the IDEA Amendments of 1997 added a requirement that each child's IEP team must include at least one regular education teacher of the child, if the child is, or may be, participating in the regular education environment (*see* § 300.344(a)(2)). (*See also* §§ 300.346(d) on the role of a regular education teacher in the development, review and revision of IEPs.).

34 C.F.R. 300 app. A.

Prior to 1997, the IDEA provided that the school district was obligated to include the student's current teacher as a member of the IEP team. In 1997, Congress revised the IDEA to require the inclusion of "at least one regular education teacher of such child (if the child is, *or may be,* participating in the regular education environment)" and "at least one special education teacher, or where appropriate, at least one special education provider of such child." 20 U.S.C. § 1414(d)(1)(B) (2003) (emphasis added).

The plain meaning of the terms used in section 1414(d)(1)(B) compels the conclusion that the requirement that least one regular education teacher be included on an IEP team, if the student may be participating in a regular classroom, is mandatory – not discretionary. Thus, the district court's finding that the IEP team was properly constituted under the IDEA without at least one regular education teacher was clearly erroneous. Accordingly, we must decide whether the FWSD's failure to comply with the requirement of the IDEA that at least one regular

education teacher evaluate the unique needs of a disabled student fatally compromised the integrity of the IEP and compels us to reverse the district court's judgment without considering whether the error was harmless or whether the findings of the ALJ and the district court that the IEP meets the substantive requirements of the IDEA are clearly erroneous.

B.

Citing *Poolaw v. Bishop,* 67 F.3d 830, 833 (9th Cir. 1995), FWSD contends that "[a] district court's determination that a student is incapable of deriving educational benefits unless placed in a self contained program is reviewed for clear error." Appellees' Brief at 21-22. This standard of review is only applicable to a district court's factual findings regarding whether a school district has complied with the IDEA. "The appropriateness of a special education placement under the IDEA is reviewed *de novo.*" *Poolaw,* 67 F.3d at 833 (citing *Target Range,* 960 at 1483). Because FWSD violated the procedural requirement of the IDEA that at least one regular education teacher participate in the evaluation of an IEP, we are precluded by the law of this circuit from considering the district court's factual findings regarding the merits of the substantive provisions of the IEP.

In *Bd. of Educ. v. Rowley,* 458 U.S. 176 (1982), the Supreme Court instructed that a state must comply both procedurally and substantively with the IDEA. *Id.* at 206-07. The Court held that "a court's inquiry in suits brought under § 1415(e)(2) is twofold. First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the

Act's procedures reasonably calculated to enable the child to receive educational benefits?" *Id.* (footnotes omitted). The Court reversed the judgment of the Court of Appeals which had affirmed the district court's decision that a deaf child was denied a FAPE because school administrators denied her parents' request that she be provided with the services of a qualified sign language interpreter in all of her classes. *Id.* at 209-10. The Court held, "[T]he findings of neither court would support a conclusion that Amy's educational program failed to comply with the *substantive* requirements of the Act." *Id.* at 209 (emphasis added). While the Court concluded that the findings of the district court that the IEP complied with the substantive provisions of the IDEA were not clearly erroneous, it held that a remand was compelled because the district court failed to determine whether the state complied with the procedural requirements of the IDEA. *Id.* at 209-10. Here, the district court determined that the FWSD did not violate the procedural requirements of the IDEA. Thus, even if we assume *arguendo* that the findings of the ALJ and the district court in this matter that the IEP complied with the substantive requirements of the Act pursuant to *Rowley,* we must determine the effect on the district court's judgment of the FWSD's failure to comply with its duty under IDEA to appoint at least one regular education teacher to the IEP team.

To date, the Supreme Court has not expressly determined whether a violation of the procedural requirements of the IDEA is subject to harmless error review. That issue was not properly before it in *Rowley* because the district court had failed to rule on the respondents' contention that petitioners had failed to comply with the IDEA's procedural requirements. 458 U.S. at 210 n.32.

In cases decided after *Rowley* was published, we have concluded that we will not review the substantive provisions of an IEP if a school district fails to include on the IEP team persons identified by Congress as possessing the necessary qualifications to develop an IEP. In *Target Range,* we commented that "[p]rocedural flaws do not automatically require a finding of a denial of a FAPE. However, procedural inadequacies that result in the loss of educational opportunity, or seriously infringe on the parents' opportunity to participate in the IEP formulation process, clearly result in the denial of a FAPE." 960 F.2d at 1484 (internal citations omitted).

In *Target Range,* we held that the school district violated the procedures mandated by Congress in the IDEA by failing to secure the participation of the disabled student's regular education teacher, or any representative of the private school he attended after the school district refused to identify him as disabled or develop an IEP. We held in *Target Range* that "the procedural defects in the development of the IEP resulted in denying [the student] a FAPE." *Id.* at 1485. We reasoned that because the school district failed to consider the recommendations of persons who were the most knowledgeable about the child, it failed its "duty to conduct a meaningful meeting with the appropriate parties" and accordingly, it did not "develop a complete and sufficiently individualized educational program according to the procedures specified by the Act." *Id.* at 1485. We also concluded that where the procedural inadequacies of an IEP may have resulted in the loss of an educational opportunity, or deprived a child's parents of the opportunity to participate meaningfully in forming an IEP, an appellate court should not proceed to step two of the *Rowley* analysis, i.e., whether the IEP was reasonably

calculated to enable the child to receive educational benefits. *Id.*

In *Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 877 (9th Cir. 2001), we applied the principles set forth in *Rowley* and *Target Range*. We concluded that the school district's procedural violations in developing an IEP prevented the child from receiving a FAPE. *Id.* at 890-91. In *Amanda J.*, the school district failed to allow the child's parents "to examine all relevant records with respect to the identification, evaluation, and educational placement of the child" as required by 20 U.S.C. § 1415(b)(1)(A). *Id.* at 891 (quoting 20 U.S.C. § 1415(b)(1)(A)). We held that "[p]rocedural violations that interfere with parental participation in the IEP formulation process undermine the very essence of the IDEA." *Id.* at 892. We characterized the procedural violation as "egregious." *Id.* at 891. We declined to address the question whether the IEP was reasonably calculated to enable Amanda J. to receive educational benefits. *Id.* at 895 (citing *Target Range*, 960 F.2d at 1485).

More recently, in *Shapiro ex rel. Shapiro v. Paradise Valley Unified Sch. Dist.*, 317 F.3d 1072 (9th Cir. 2003), we held that the failure to include a representative from the private school that the child was currently attending on the IEP team violated the procedural requirements of the IDEA. We reasoned that the failure to include "the teachers most knowledgeable about [the child's] special educational levels and needs" was a violation of the IDEA. *Id.* at 1076-77. We concluded in *Shapiro* that it was not necessary to address the second prong of the *Rowley* FAPE analysis. *Id.* at 1079 (citing *Amanda J.*, 267 F.3d at 895, and *Target Range*, 960 F.2d at 1485).

The FWSD maintains that the failure to include at least one regular education teacher on the team that developed the IEP is not the type of procedural flaw that would compel us to hold that Appellants were denied their right to a FAPE. They cite our decision in *Ford v. Long Beach Unified Sch. Dist.*, 291 F.3d 1086 (9th Cir. 2002) for this proposition. Their reliance on *Ford* is misplaced. It is readily distinguishable.

In *Ford*, the state's hearing officer and the district court upheld the school district's assessment that a student was not disabled. *Id.* at 1087. Before this court, the student's parents contended that "the assessment [of Amanda's abilities and disabilities] was inadequate because it did not include classroom observation of Amanda by someone other than her regular education teacher as required by C.F.R. § 300.542." *Id.* at 1089. Because the student was assessed as not being disabled, no IEP was developed. We held in *Ford* that the failure to comply with the C.F.R. § 300.542 "did not affect the validity of the assessment." *Id.* at 1089. No contention was asserted in *Ford* that the school district violated the procedural requirements of the IDEA by its failure to include an individual identified by Congress as necessary to evaluate a student's abilities or disabilities. Thus, our opinion in *Ford* does not resolve the question whether the failure of the FWSD to include at least one regular education teacher on the IEP prejudiced Appellant's rights to a FAPE.

The record demonstrates that the FWSD failed to comply with the "rigorous procedural requirements of IDEA." *Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1524 (9th Cir. 1994). The failure to include at least one regular education teacher on the IEP team deprived the team of

"important expertise regarding the general curriculum and the general educational environment." 34 C.F.R. 300 app. A. The IEP team did not include individuals Congress concluded were most knowledgeable about a disabled student's special educational needs. As a result, we have no way of determining whether the IEP team would have developed a different program after considering the views of a regular education teacher. The failure to include at least one regular education teacher on the IEP team was a structural defect in the constitution of the IEP team.

In cases involving criminal prosecutions, the Supreme Court has ruled that a structural defect in the trial mechanism is not subject to harmless error analysis. *Arizona v. Fulminante,* 499 U.S. 279, 309 (1991). We have defined a structural defect as "an error 'that permeate[s] the entire conduct of the trial from beginning to end or affect[s] the framework within which the trial proceeds.'" *United States v. Recio,* 371 F.3d 1093, 1102 (9th Cir. 2004) (quoting *Rice v. Wood,* 77 F.3d 1138, 1141 (9th Cir. 1996) (internal citations and quotation marks omitted)).

The requirement that an appellate court must reverse because of the effect of a structural error has been applied in civil disputes where members of an evaluation board expressly mandated by Congress were not included. In *Doyle v. United States,* 599 F.2d 984 (Cl. Ct. 1979), *amended on other grounds by* 609 F.2d 990 (Cl. Ct. 1979), the Court of Claims reversed the decision of the Army Board for the Correction of Military Records because none of the selection boards convened for the evaluation of reserve officers for promotion to permanent rank included any reserve officers, as required by 10 U.S.C. § 3362(b) (repealed and recodified at 100 U.S.C. § 14102(b)). The Court of Claims held that the failure to include reserve

officers on the selection boards for evaluating reserve officers for promotion was not subject to harmless error analysis. It reasoned as follows:

> The error in this case, however, is not a violation of the plaintiffs' substantive rights but rather a violation of the plaintiffs' rights to fair procedure or process. We are not unmindful of the fact that the due process protections of the fifth amendment have been sparingly extended to government employees, but that problem is immaterial to this case. The error is the violation of procedures instituted by statute and regulation, and, though federal employees may not be entitled to any procedure not established by Congress or agency, we have always held that they are entitled to such procedure that has been so provided.
>
> Since this case presents the issue of procedural errors in the decision-making process of a selection board, we find those cases dealing with the violation of constitutional procedural rights to be more analogous. The Supreme Court has recognized that even in the case of constitutional error occurring in a criminal trial, not every such error requires "the automatic reversal of the conviction"; a conviction will be upheld if the "federal constitutional error . . . was harmless beyond a reasonable doubt." *Chapman v. California,* 386 U.S. 18, 22, 24, 87 S.Ct. 824, 827, 828, 17 L.Ed.2d 705 (1967). *See, e.g., Harrington v. California,* 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969) (violation of sixth amendment right of confrontation); *United States v. Parker,* 549 F.2d 1217, 1221 (9th Cir. 1977), *cert. denied,* 430 U.S. 971, 97 S.Ct. 1659, 52 L.Ed.2d 365 (1977) (prosecutor's comment on defendant's failure to testify, in violation of fifth amendment).

Some constitutional rights, however, are "so basic to a fair trial that their infraction can never be treated as harmless error. . . . " *Chapman v. California, supra,* 386 U.S. at 23, 87 S.Ct. at 827 (coerced confession, right to counsel, impartial judge). These include cases in which compositional defects are found to exist in respect to juries. *See, e.g., Whitus v. Georgia,* 385 U.S. 545, 87 S.Ct. 643, 17 L.Ed.2d 599 (1967). Two justifications for the rule of automatic reversal are generally advanced. First, some errors are so inimical to judicial or fair process that their violation cannot be tolerated under any circumstances. Application of the test of harmless error would result in the dilution of the afforded protection. Second, a court, in the case of some errors, such as the improper composition of a jury or the bias of a judge, "has no way of evaluating the effect of the error on the judgment in the dark of what might have been but never was,. . . . " R.J. Traynor, *The Riddle of Harmless Error* 66 (1970).

Though the proceeding involved herein is evaluational, not accusatory, and the error statutory, not constitutional, we do not for these reasons believe that these plaintiffs are entitled to any less protection. Decisions of selection boards have important consequences for those considered. They are either promoted to higher rank and pay or are terminated and lose their employment and pay. The statute explicitly commands that selection boards shall be composed of an appropriate number of Reserve officers so that Reserve officers will not be prejudiced and so that Congress' purpose that the nation is protected by a military composed of those officers best qualified regardless of their status as Regular or Reserve officers,

> is carried out. We believe that Congress' purpose would be thwarted unless a Secretary is aware that this is a statutory requirement that cannot be waived.
>
> Moreover, we believe that the second justification for the automatic reversal rule, that it is not possible for a reviewing body to determine what effect the error had on the judgment of the original proceeding, forces us to conclude that the doctrine of harmless error cannot be applied to this type of procedural error.

Id. at 995-96.

In *Dilley v. Alexander,* 603 F.2d 914 (D.C. Cir. 1979), the United States Court of Appeals for the District of Columbia held that the failure of the Army to include reserve officers on a promotion board violated 10 U.S.C. § 266 (1976). *Id.* at 920. The court rejected the Army's contention that the appellants were not prejudiced by the defect in the composition of the promotion board because a subsequently properly constituted Relook Board found that the defect in the composition of the 1975 promotion board did not result in any prejudice to the appellants. The court stated: "[T]he *prejudice* which the statute guaranteed against, insofar as reserve officers were concerned, was consideration by a promotion board devoid of reserve officers." *Id.* at 921 (emphasis in original). In addition, the court reasoned that the Relook Board's findings, "while laudable perhaps, are either irrelevant or incorrect as a matter of law. Although a desire to eliminate prejudice obviously occasioned the enactment of the statute, section 266 itself does not outlaw anti-Reserve bias. *It prescribes a procedural entitlement that no subsequent factual findings can diminish.*" *Id.* at 923-24 (emphasis

added). The court further commented in *Dilley* that, "Congress made a decision over a quarter of a century ago that a promotion selection board considering Reserve candidates was inherently defective if it lacked Reserve representation; the Army was not at liberty to review and reverse that congressional decision on its own." *Id.* at 924.

I am persuaded by the analysis in *Doyle* and *Dilley* that the failure to include the individuals identified by Congress as necessary participants in evaluating whether entitlement to benefits has been demonstrated is applicable to an administrative proceeding under the IDEA. Accordingly, I conclude that the failure to include at least one regular education teacher, standing alone, is a structural defect that prejudices the right of a disabled student to receive a FAPE. Under these circumstances, a review of the findings of the ALJ and the district court regarding the merits of the substantive recommendations of an illegally constituted IEP team for clear error would produce a futile advisory opinion which is beyond our judicial power or competence.

C.

The FWSD argues that the participation of a regular education teacher on the IEP team was not required because it was not likely that M.L. would be placed in an integrated classroom since the Evaluation Report recommended against it. This argument completely ignores the fact that the record shows that the Tukwila IEP directed that M.L. be placed in a regular kindergarten classroom. M.L. had attended a regular preschool classroom for three years. After his family moved to the FWSD, M.L. was placed in Ms. Ramsey's regular education classroom. This

contention is also inconsistent with the FWSD's representation that "the District did not predetermine the Student's placement." Appellees' Brief at 35. In light of these facts, the record supports an inference that it was possible that M.L. would be placed in a regular education classroom. So long as this was a possibility, participation of a regular education teacher in the IEP team was required by the IDEA.

The FWSD was aware that two teachers had observed M.L. in an integrated classroom. Ms. Ramsey had observed him for one week before his mother withdrew him because he was teased by non-disabled children. Ms. Wicks had observed M.L. for three years in an integrated preschool classroom. Of the two regular education teachers, Ms. Wicks was the most knowledgeable about M.L.'s educational needs because she had been his teacher for three years. She recommended that M.L. be placed in an integrated classroom. The FWSD did not include either Ms. Ramsey or Ms. Wicks or any other regular education teacher on its IEP team.

The FWSD appears to suggest that the Appellants waived their right to object to the failure to include a regular education teacher on the IEP team because they failed to attend the IEP meetings. The FWSD argues that "[t]he District attempted to facilitate the Parents' participation in the IEP meeting but the Parents refused to attend. Their refusal to participate was at their own risk." Appellees' Brief at 36-37. We rejected a similar argument in *Target Range*:

> *The Act imposes upon the school district the duty to conduct a meaningful meeting with the appropriate parties.* Target Range failed to do so. Target Range failed to fulfill the goal of parental

> participation in the IEP process and failed to develop a complete and sufficiently individualized educational program according to the procedures specified by the Act.

960 F.2d at 1485 (emphasis added).

The FWSD's assumption-of-the-risk defense betrays its misunderstanding of the importance of the procedural requirements of the IDEA. The Supreme Court stated in *Rowley,* that "[w]e think that the congressional emphasis upon full participation of concerned parties throughout the development of the IEP . . . demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of the substantive content in an IEP." *Id.* at 206.

Clearly, under the circumstances of this case, Ms. Wicks was a concerned party regarding the placement of M.L. in an integrated classroom because he was her student for three years. Because she was not included in the IEP team, we have no way of ascertaining whether her observations would have persuaded the other team members to formulate a different program for M.L. that would be appropriately tailored to his abilities and special needs. Ms. Ramsey's more limited observation of M.L. in her integrated classroom might also have assisted the IEP team in ensuring that M.L. received a FAPE based on his physical and mental condition. Indeed, any regular education teacher would have contributed his or her knowledge of the ability of a disabled student to benefit from being placed in a regular classroom. The Appellants are not responsible for the FWSD's violation of the procedural requirements of the IDEA.

The FWSD argues that it was not compelled to ensure the participation of a regular education teacher "because the evaluators had recommended a self-contained placement." Appellees' Brief at 28. This argument ignores the fact that although the FWSD named a regular education teacher to be a member of the IEP team, she did not attend the November 13, 2000 meeting. Having determined a regular education teacher should be a member of the IEP team, the FWSD should have cancelled that meeting instead of proceeding with an illegally constituted IEP team.

Under the law of this circuit, the FWSD violated the procedural requirements of the IDEA, by failing to ensure the participation of a regular education teacher in the evaluation of M.L.'s educational needs. This structural defect compels reversal of the district court's judgment without considering the merits of the IEP developed without the evaluation of at least one regular education teacher.

III

The Appellants further assert that M.L. was denied a FAPE because the FWSD failed to take action to prevent other students from teasing M.L. The Appellants argue that there is uncontradicted evidence in the record that the FWSD was deliberately indifferent to C.D.'s reports that her child was being teased. They maintain that the teasing resulted in a denial of a FAPE. Neither the statute nor any court has directly addressed the question whether unremedied teasing can constitute a denial of a FAPE. *Cf. Charlie F. ex rel. Neil F. v. Bd. of Educ.*, 98 F.3d 989, 993 (7th Cir. 1996) (holding that, "at least in principle relief is

available under the IDEA" when a teacher invited her pupils to express their complaints about a disabled student which led to humiliation, fistfights, mistrust, loss of confidence and self-esteem, and disruption of his educational progress).

Under the IDEA, a disabled child is guaranteed a FAPE, 20 U.S.C. § 1412(1), which "'provide[s] *educational benefit* to the handicapped child.'" *Gregory K.*, 811 F.2d at 1314 (quoting *Rowley*, 458 U.S. at 201) (emphasis added). If a teacher is deliberately indifferent to teasing of a disabled child and the abuse is so severe that the child can derive no benefit from the services that he or she is offered by the school district, the child has been denied a FAPE. *Cf. Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 633 (1999) (holding that to violate Title IX "harassment . . . [must be] so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit").

The record shows that by removing M.L. from Mark Twain Elementary School after only five days, Appellants failed to give the FWSD a reasonable opportunity to find a way to prevent the other students from teasing M.L. Appellants have also failed to demonstrate that teasing resulted in the loss of an educational benefit. Appellants have offered no evidence that the teasing affected M.L. or interfered with his education. C.D. testified that during one of the teasing incidents, M.L. was "happy as a little lark." C.D. also stated that during another episode "because he had his headphones on most of the time he was being teased . . . [she] didn't know if he even heard it."

Appellants contend, without evidentiary support, that unpunished teasing "can easily escalate from mere verbal

abuse, to physical or sexual abuse" and is "potentially dangerous." Appellants' Brief at 52, 54. Appellants also argue that teasing poses a particular danger to M.L. since, because he has little or no verbal skills, he would be unable to report any physical abuse. However, Appellants have not directed this court's attention to any violence, or threat of physical contact between another student and M.L. Appellants have not adduced sufficient evidence to show that M.L. was denied a FAPE by the FWSD's alleged failure to stop M.L.'s classmates from teasing him during his five days in a regular education classroom.

CONCLUSION

The FWSD's failure to ensure the participation of a regular education teacher on the IEP team when there was a possibility that M.L. would be placed in an integrated classroom was a significant violation of the structural requirements of the IDEA's procedures requiring vacation of the order granting summary judgment in favor of the FWSD. Upon remand, the district court is instructed to enter an order directing the FWSD to select an IEP team that fully complies with the procedural requirements of the IDEA.

Upon remand, the district court is requested to determine, in its discretion, whether to award reasonable attorneys fees as part of the costs to the Appellants as the prevailing parties pursuant to 20 U.S.C. § 1415(i)(3)(B). The district court should also determine whether the Appellants are entitled to equitable reimbursement for the educational costs they have incurred due to the FWSD's procedural violation of the IDEA.

VACATED and **REMANDED** with instructions.

GOULD, Circuit Judge, concurring in part and concurring in the judgment:

I concur in the judgment and in Sections I, II-A, II-C, and III of Judge Alarcon's opinion. I agree that 20 U.S.C. § 1414(d)(1)(B)(ii) requires that at least one regular education teacher be included on an Individualized Education Program ("IEP") team, and that the omission of a regular education teacher from M.L.'s IEP team was procedural error. However, I do not agree with the *per se* "structural defect" analysis adopted by Judge Alarcon in Section II-B. I write separately to make clear that our court's procedural analysis under IDEA does not start and end with automatic reversal based on a theory of structural error. Instead, we must assess the school district's error for harmlessness – in accord with our precedent in *Target Range, Amanda J.*, and *Shapiro* – by considering whether the procedural error resulted in a loss of educational opportunity or significantly restricted parental participation in the IEP formation. IDEA procedural error may be held harmless in appropriate cases, and this may include cases involving a mistake in how the IEP team was constituted. Although Judge Clifton in dissent and I in concurrence agree on the rejection of structural error and on the standard for assessing harmless error, we reach different conclusions in the application of the governing standard.[1] We both agree that the harmless error

[1] Judge Clifton's dissent states:

> Finally, I agree with Judge Gould, as expressed in Section I of his opinion, that a structural error analysis is not supported by our caselaw and has no place in the IDEA context. As Judge Gould correctly observes, a procedural violation constitutes a denial of a free and appropriate public education only when it results in a lost educational opportunity

(Continued on following page)

assessment turns here on whether there was a "loss of educational opportunity" for M.L. Applying this correct test for harmless error, I further conclude that the error in composition of the IEP team, under the circumstances of this case, caused a violation of the IDEA and requires reversal of the district court's order granting summary judgment.

In Section I, I explain what I believe to be the controlling test for harmless error under our case law and why I believe a structural defect analysis is inapplicable in an IDEA context. In Section II, I apply the harmless error test to the facts in the record, and conclude that the procedural error in this case was not harmless. Hence, I concur in the judgment reached by Judge Alarcon, but not the structural error analysis that he advances.

I

A

In *Board of Education v. Rowley*, 458 U.S. 176, 206-207 (1982), the Supreme Court established a framework for IDEA review: "First, has the State complied with the procedures set forth in the Act? And second, is the individualized

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for the child or significantly restricts parental participation in formation of the IEP.

Dissent at 15689.

Judge Clifton in his dissent concludes that the error in composition of the IEP team was harmless under the same standard I apply. Our differences turn in part on our disagreement on whether the assessment of loss of educational opportunity is a question of fact to be reviewed for clear error, or a mixed question of fact and law, to be reviewed de novo, as can be seen from a comparative review of our opinions, which apply the same standard but reach contrary results.

educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" In applying this standard, our cases (and those of our sister circuits) have not adopted a structural error approach. Instead, each case treats the procedural prong of *Rowley* as having two subparts: First, was there a procedural violation of the IDEA, and second, if there was error, did it affect the substantive rights of the plaintiff. *See* 28 U.S.C. § 2111 ("On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.").

The test for determining whether IDEA procedural error affects the substantial rights of the parties has been established by our prior precedent. In *W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23*, 960 F.2d 1479, 1484 (9th Cir. 1992) ("*Target Range*"), we stated: "Procedural flaws do not automatically require a finding of a denial of a FAPE. However, procedural inadequacies that result in the loss of educational opportunity, or seriously infringe the parents' opportunity to participate in the IEP formulation process, clearly result in the denial of a FAPE." *Id.* (internal citations omitted).[2] Our more recent

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[2] In *Target Range*, we addressed whether omissions in the formulation of an IEP constituted the denial of a free appropriate public education ("FAPE"). The district court had held in favor of the plaintiff family, finding that the Target Range school district had failed to include important parties – the child's parents, regular education teacher, or a representative of the private school the child had also attended – in the IEP development. 960 F.2d at 1483-1484. We affirmed, holding that "Target Range clearly did not comply with the procedures required by the IDEA." *Id.* Our analysis elaborated that procedural errors do not amount to a *per se* denial of a FAPE, but,

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cases follow the *Target Range* procedural error analysis. *See Shapiro v. Paradise Valley Unified Sch. Dist.*, 317 F.3d 1072, 1079-1080 (9th Cir. 2003) (quoting and applying the *Target Range* standard in holding that the omission of a child's parents and a teacher from her prior school were procedural violations in the creation and composition of her IEP team which amounted to the denial of a FAPE because they "resulted in the loss of educational opportunity for [the child]") *superseded on other grounds by* 20 U.S.C. § 1414(d)(1)(B); *Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 877, 891-892 (9th Cir. 2001) (applying the *Target Range* analysis to an "egregious" IDEA procedural error instead of granting automatic reversal). In sum, our precedents in *Target Range, Amanda J.*, and *Shapiro* establish that not all procedural violations by a school district in implementing the IDEA will necessarily result in the denial of a FAPE. Procedural error – including in M.L.'s case the omission of members of an IEP team – constitutes the denial of a FAPE only when it results in lost educational opportunity for the child, or when it significantly restricts parental participation in the IEP formation. *See Target Range*, 960 F.2d at 1484; *Shapiro*, 317 F.3d at 1079; *Amanda J.*, 267 F.3d at 892; *Ms. S. ex rel. G. v. Vashon Island Sch. Dist.*, 337 F.3d 1115, 1129 (9th Cir. 2003) *superseded on other grounds by* 20 U.S.C. § 1414(d)(1)(B).

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rather, that we will find that a FAPE has been denied where procedural inadequacies result in the "loss of educational opportunity," or when such errors "seriously infringe" parental ability to participate in the IEP process. *Id.* at 1484.

B

Judge Alarcon characterizes the absence of a regular education teacher from M.L.'s IEP team as a "structural error" or a "structural defect" that is not subject to harmless error analysis. Judge Alarcon's Opinion at 15666. In doing so, he extrapolates from the criminal context, where the Supreme Court has immunized certain errors that affect the constitutional rights of defendants from harmless error review. *See generally Arizona v. Fulminante,* 499 U.S. 279, 309-310 (1991); *Chapman v. California,* 386 U.S. 18, 22-24 (1967).[3]

While one might in other contexts applaud a creative solution to a difficult case, I find this structural error analysis strikingly inapplicable in our civil case context, where we are asked to assess whether a school district has infringed a child's rights to education consistent with the IDEA. Even in the realm of constitutional error in criminal prosecutions, where life and liberty are at stake, the Court has made clear that the situations where we will find structural error requiring automatic reversal are a "very limited class of cases." *Johnson v. United States,* 520 U.S. 461, 468 (1997).[4] Structural errors are the "exception

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[3] In support of his extension of this concept to our civil case, Judge Alarcon cites two 1979 cases external to our circuit addressing promotional evaluation boards in the United States Army, *Doyle v. United States,* 599 F.2d 984 (Cl. Ct. 1979), and *Dilley v. Alexander,* 603 F.2d 914 (D.C. Cir. 1979). *Doyle* and *Dilley* analogized to the structural defect cases discussed in *Chapman,* holding that the omission of statutorily-mandated reserve officers from military boards evaluating reservists for promotion was a structural error which was *per se* prejudicial and precluded any subsequent harmless error review. *Doyle,* 599 F.2d at 995; *Dilley,* 603 F.2d at 921-924.

[4] In emphasizing the narrowness of this limited universe of structural defects warranting *per se* relief, the Supreme Court, in *Neder*

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and not the rule," *Rose v. Clark*, 478 U.S. 570, 578 (1986), and "most constitutional errors can be harmless." *Fulminante*, 499 U.S. at 306.

Judge Alarcon cites no precedent applying structural error in civil cases in our circuit, and I have found none, nor has he cited any IDEA-specific cases in our circuit applying a structural error test to procedural error.[5] Moreover, Judge Alarcon does not cite any examples of IDEA structural error analysis from other circuits. In fact, our sister circuits have consistently rejected *per se* IDEA structural error arguments, and instead have adopted case-by-case, harmless error inquiries similar to our standard, which I have reviewed above.[6] Nor does the

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v. United States, 527 U.S. 1, 8 (1999), cited key cases identifying such defects:

> *Johnson v. United States*, 520 U.S. 461, 468, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997) (citing *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)) (complete denial of counsel); *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (biased trial judge); *Vasquez v. Hillery*, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986) (racial discrimination in selection of grand jury); *McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984) (denial of self-representation at trial); *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) (denial of public trial); *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) (defective reasonable doubt instruction).

[5] The two Ninth Circuit cases cited by Judge Alarcon to define structural error both concern the constitutional rights of criminal defendants. *United States v. Recio*, 371 F.3d 1093, 1101 (9th Cir. 2004); *Rice v. Wood*, 77 F.3d 1138, 1141 (9th Cir. 1996). They are inapposite in this IDEA context.

[6] *Adam J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804, 812 (5th Cir. 2003) (citing *Target Range*, 960 F.2d at 1484, and holding that "even if the determination of [the child's] IEP was procedurally deficient in some respects, he has not established that any procedural deficiency

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structural error position in IDEA litigation find any support in the text or legislative history of the IDEA. In the absence of guidance from the Court or Congress, we should conclude that IDEA cases are subject to the general

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resulted in a loss of educational opportunity or infringed his parents' opportunity to participate in the IEP process"); *DiBuo v. Bd. of Educ.*, 309 F.3d 184, 191 (4th Cir. 2002) (rejecting the argument that a procedural IDEA violation should constitute a *per se* denial of a FAPE); *MM v. Sch. Dist. of Greenville County*, 303 F.3d 523, 533 (4th Cir. 2002) (holding that "[w]hen such a procedural defect exists, we are obliged to assess whether it resulted in the loss of educational opportunity for the disabled child, or whether, on the other hand, it was a mere technical contravention of IDEA"); *T.S. v. Indep. Sch. Dist. No. 54*, 265 F.3d 1090, 1095 (10th Cir. 2001) ("Procedural defects alone do not constitute a violation of the right to a FAPE unless they result in the loss of educational opportunity."); *Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 765 (6th Cir. 2001) ("[A] procedural violation of the IDEA is not a *per se* denial of a FAPE; rather, a school district's failure to comply with the procedural requirements of the Act will constitute a denial of a FAPE only if such violation causes substantive harm to the child or his parents. . . . [P]rocedural violations that deprive an eligible student of an [IEP] or result in the loss of educational opportunity also will constitute a denial of a FAPE under the IDEA."); *Weiss v. Sch. Bd. of Hillsborough County*, 141 F.3d 990, 996 (11th Cir. 1998) ("For the [plaintiff family] to prove that [their child] was denied a FAPE, they must show harm to [the child] as a result of the alleged procedural violations. Violation of any of the procedures of the IDEA is not a *per se* violation of the Act."); *Heather S. v. Wisconsin*, 125 F.3d 1045, 1059 (7th Cir. 1997) (quoting the *Target Range* standard); *Indep. Sch. Dist. No. 283 v. S.D.*, 88 F.3d 556, 562 (8th Cir. 1996) ("An IEP should be set aside only if procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of educational benefits.") (internal quotation marks omitted); *Murphy v. Timberlane Reg. Sch. Dist.*, 22 F.3d 1186, 1196 (1st Cir. 1994) ("[N]ot every procedural irregularity gives rise to liability under the IDEA. Nevertheless, procedural inadequacies [that have] compromised the pupil's right to an appropriate education . . . or caused a deprivation of educational benefits are the stuff of successful IDEA actions.") (internal quotation marks omitted); *Hampton Sch. Dist. v. Dobrowolski*, 976 F.2d 48, 52-53 (1st Cir. 1992).

principle of harmless error that applies generally in civil and criminal law contexts. *See* 28 U.S.C. § 2111; Fed R. Crim. P. 52(a); Fed. R. Civ. P. 61.

Judge Alarcon's structural error analysis disclaims a general applicability and purports to be limited, advocating a *per se* rule of reversal only for the violation of one procedural requirement of the IDEA: 20 U.S.C. § 1414(d)(1)(B)(ii), the requirement that an IEP team include a regular classroom teacher. However, Judge Alarcon sets forth no persuasive qualitative distinction between § 1414(d)(1)(B)(ii) and the other procedural requirements of the IDEA, which too are important.[7] Consequently, Judge Alarcon's opinion posits no necessary or logical stopping point prohibiting future courts from applying a structural error approach to virtually any IDEA procedural error. In my view, the best means by which to

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[7] Judge Alarcon emphasizes that the 1997 IDEA amendments revised the language of this provision, changing the IEP team requirement from the current teacher, when general education is a real possibility, to both a regular classroom teacher and a special education teacher. Op. at 15661; *compare* 20 U.S.C. § 1414(d)(1)(B) (2003), *with* 20 U.S.C. § 1401(a)(20) (1996). But the 1997 IDEA amendments were numerous and substantive, affecting the entire statutory scheme, and reworking several procedural requirements, including other aspects of the IEP process. *See generally* Dixie Snow Huefner, *The Individuals With Disabilities Education Act Amendments of 1997,* 122 Ed. L. Rep. 1103 (1998). Other "[m]ajor new requirements were added to the IEP section." *Id.* at 1112-15. We accounted for Congress's purpose and focus, when it amended the provision, by our holding that it had been violated, and by rejecting the school district's array of defensive arguments. Yet, there is nothing in the statute or its regulations from which to conclude that those changes necessitate that § 1414(d)(1)(B)(ii) have its own structural defect procedural error analysis, separate and apart from the analysis applied to the other equally important IDEA procedural requirements, and at odds with the general course of civil and even criminal law.

differentiate between such errors is to evaluate each one individually – as colored by each case's particular facts – and to apply a uniform standard that assesses lost educational opportunity or lost parental participation, not by adopting a *per se* rule that insulates a subset of errors from future review. It should not be forgotten that, in interpreting IDEA, we, like the school district, parents, and the advocates participating in administrative hearing and in the courts, are trying to determine what is best for a disabled child.

II

Accordingly, my analysis takes me back to where I commenced, applying the *Target Range* standard to determine whether the procedural error in IEP team composition amounted to denial of a FAPE by either excluding appropriate parental participation or causing a lost educational opportunity for the child. This case poses no genuine issue of whether a parent of M.L. was excluded from the IEP process,[8] and so the controlling issue becomes whether the failure to include a regular education teacher on the IEP team resulted in a "loss of educational opportunity" within the meaning of the test established in *Target Range*. I am persuaded that, under the total circumstances, M.L. lost an educational opportunity because the FWSD violated the procedural requirements of the IDEA by failing to include a participating regular education teacher on the IEP team.[9]

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[8] Appellants do not contend that the FWSD's procedural error significantly restricted their participation in the IEP process.

[9] We review de novo the district court's conclusions of law. *Gregory K. v. Longview Sch. Dist.*, 811 F.2d 1307, 1310 (9th Cir. 1987). Judge Clifton concludes that the question of harmless error is one of fact and

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The statutory requirement that an IEP team for a disabled child who is or may be in regular education must include a regular education teacher is not merely technical. A regular education teacher may have insights or perspectives that aid the process of IEP formation. We need not say that error in composition of an IEP team is always prejudicial and invariably results in the denial of a FAPE. Rather, we should assess the circumstances of each case, and here the record demonstrates that the failure to include Ms. Ramsey or Ms. Wicks or any other regular education teacher on the participating IEP team deprived M.L. of an educational opportunity.

This conclusion is unmistakable for several reasons. First, there is the IDEA's statutory preference for mainstreaming. The IDEA favors mainstreaming the education of a disabled child to "the maximum extent appropriate" given the nature of the child's disability. 20 U.S.C. § 1412(a)(5)(A).[10] When mainstreaming is pursued with a disabled child, and the child's education proceeds in the

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that we review the district court's findings for clear error. Dissent at 15695-96. His analysis must concede, however, that the district court did not "fram[e][its] discussion in terms of 'loss of educational opportunity'" and that "the meaning of the phrase 'lost educational opportunity'" is a legal question. Dissent at 1591, 1595-96 n.3. For these reasons, the question of whether M.L. has "los[t] an educational opportunity" under the IDEA is a mixed question of law and fact which we review de novo. *Gregory K.*, 811 F.2d at 1310; *Target Range*, 960 F.2d at 1483 (holding that the issue of whether a proposed IEP constitutes a FAPE is a mixed question of law and fact that we review de novo).

[10] To better accomplish this goal and accommodate those disabled children who might require specialized tools and supplements, Congress mandated that a child could only be removed from the regular class environment when the "use of supplementary aids and services could not be achieved satisfactorily" in the regular educational environment. 20 U.S.C. § 1412(a)(5)(A).

"Least Restrictive Environment," as set forth in 20 U.S.C. § 1412(a)(5)(A), the crucial purposes and requirements of IDEA are realized: The disabled child receives the benefit of observing and working with those who are not disabled, which can provide the disabled child with both educational and non-academic benefits. Children who are not disabled are given the opportunity to become better acquainted with their disabled peers, which may help avoid stereotyping, lessen prejudice, and prepare all students to work together in society. Most importantly, mainstreaming is the mechanism for fulfilling the statutory goal that the disabled child be educated in the least restrictive setting, which experience tells us is best for the child's development. *See e.g.*, Alan Gartner & Dorothy K. Lipsky, *Beyond Special Education: Toward a Quality System for All Students*, 57 Harv. Educ. Rev. 367, 375 (1987) (concluding that there is a "substantial and growing" body of evidence that supports the academic and emotional developmental value of mainstreaming). The parents of disabled children do not have to prove a regular education environment is best for their children; rather, it is the school district's burden to explain in the IEP the extent to which a child cannot participate in regular education activities. 20 U.S.C. § 1414(d)(1)(A)(iv).

Second, Ms. Wicks, M.L.'s prior regular education teacher, had written to the FWSD, informing the school district that M.L. had made "good progress" in her class, which was comprised of twelve non-disabled students and four or five with "special needs," and recommending that M.L. remain in regular education during his kindergarten year. Third, the FWSD had appointed a regular education teacher to the IEP team, but inexplicably went forward with the IEP planning meeting without that teacher's

presence and participation. Fourth, M.L.'s past IEP and placement demonstrated that it was at least possible to conclude that M.L. could be placed in a regular education classroom.

I certainly recognize that M.L.'s education in a regular classroom poses serious challenges for him, for classmates, for instructors, and for administration. That is clear from the record before us. But under the totality of circumstances, we cannot readily conclude that the statutory violation in not having a regular education teacher participate on the IEP team was harmless. To the contrary, there is a strong likelihood that mainstreaming opportunities for M.L. would have been better considered had a regular education teacher taken part in the program's preparation, and that more mainstreaming might have been permitted for M.L. under the IEP. Hence, I do not believe that we can properly hold that the error in IEP team composition here was harmless.

Because I conclude on this record that we must hold that the FWSD's IEP process caused a "loss of educational opportunity," and the district court's conclusion was error,[11] I need not reach the second step in the *Rowley* analysis, i.e., whether the IEP was "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 207; see also 28 U.S.C. § 2111 (providing that "[o]n the hearing of any appeal . . . in any case, the court shall give

[11] I reach this conclusion initially on my premise that the issue is a mixed question of fact and law, not predominantly factual in light of the IDEA's statutory preference for mainstreaming; but even if I were to view this issue under the "clear error" standard, I would still conclude that the district court's grant of summary judgment on the theory that there was no lost educational opportunity was reversible error.

judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties").[12]

CLIFTON, Circuit Judge, dissenting:

I agree with my colleagues on many of the important issues in this case. In particular, I join in Sections I, II-A, II-C,[1] and III of Judge Alarcon's opinion, and in Section I of Judge Gould's opinion. In English, that means that I agree

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[12] The dissent concludes that we must affirm because the district court found "that the program developed by the IEP team was the best placement for M.L., because it maximized the academic and nonacademic benefits available to him." Dissent at page 1125. But, the district court made its findings regarding whether the IEP was reasonably calculated to enable the child to receive educational benefits without the benefit of the views and expertise of a regular classroom teacher having been expressed at the critical IEP team meeting to discuss M.L. The IDEA mandates that a regular classroom teacher be a member of the IEP team. Although I do not think a *per se* reversal follows from a violation under our precedent, there is no doubt that the inclusion of a regular education teacher on the IEP team promotes the purposes of the IDEA. We ought not to speculate here that noncompliance with the procedural standards mandated in the IDEA did not matter. Because the failure of the school district to include a regular classroom teacher on the IEP team, conjoined with the other circumstances reviewed above that made regular education for M.L. a distinct possibility, we cannot say the error was harmless. For these reasons, and because of my disagreement on the standard of review, *see supra* notes 9 and 11, I cannot agree with my dissenting colleague's conclusion that if a regular classroom teacher had participated on the IEP team "there was [not] a realistic possibility that it would have resulted in a different assignment for M.L." Dissent at page 15699.

[1] To be precise, I do not join in the last sentence of Section II-C. In that sentence Judge Alarcon applies the "structural defect" analysis contained in Section II-B of his opinion to reach the conclusion that the district court's judgment must be reversed. I disagree with both the "structural defect" approach and the conclusion. I do agree, though, with the main point of Section II-C, which is that the school district violated the procedural requirements of the IDEA.

with both Judge Alarcon and Judge Gould that the school district should have included a regular classroom teacher on the IEP team and that the failure to do so constituted a procedural violation of the IDEA. I also agree with my colleagues that the school district's procedural error did not prevent M.L.'s parents from participating in the formation of the IEP. To the extent that M.L.'s parents enjoyed limited participation it was because the parents voluntarily removed themselves from the process. Finally, I agree with Judge Gould, as expressed in Section I of his opinion, that a structural error analysis is not supported by our caselaw and has no place in the IDEA context. As Judge Gould correctly observes, a procedural violation constitutes a denial of a free and appropriate public education only when it results in a lost educational opportunity for the child or significantly restricts parental participation in formation of the IEP.

I part with my colleagues in the application of these principles to this case, however, and reach a different conclusion. Specifically, I conclude that the failure to include a regular classroom teacher on the IEP team did not result in the loss of an educational opportunity for M.L. or deny him a free appropriate public education. Accordingly, I respectfully dissent.

Both of my colleagues focus on Plaintiffs' challenge to the procedures employed by the school district, which was the issue that Plaintiffs emphasized on appeal. The district court apparently concluded that the IDEA did not require the IEP team to include a regular classroom teacher, a view that all three of us on this panel agree was incorrect. The district court did not rely only on that erroneous legal conclusion to support its decision, however. Perhaps recognizing that it was a close question, the

district court observed that "even if" the failure to include a regular classroom teacher amounted to a procedural violation, "such a violation would not necessarily constitute the denial of a FAPE." The district court relied on *W.G. v. Board of Trustees of Target Range School District,* 960 F.2d 1479, 1484 (9th Cir. 1992), and *Amanda J. v. Clark County School District,* 267 F.3d 877, 892 (9th Cir. 2001) – the same cases cited in my colleagues' opinions – and determined that "the question whether the alleged procedural violation amounted to the denial of a FAPE depends on whether or not M.L. suffered a substantive loss of educational opportunity." That is essentially the same legal standard adopted by a majority of our panel (consisting of Judge Gould and me), as expressed in Section I of Judge Gould's opinion. In large part, it appears, because of the way the case was framed in the arguments made by the parties, the district court went on to address that question using somewhat different terminology. Nonetheless, the district court made factual findings that point to the conclusion that M.L. did not suffer a substantive loss of educational opportunity. I agree with the district court's findings and reach the same conclusion.

Plaintiffs vigorously argued to the district court that the school district had violated the substantive requirements of the IDEA, as well as its procedural requirements. A substantive violation alleged by Plaintiffs was that the school district had failed to "mainstream" M.L. to the maximum extent possible. The plan that the IEP team prepared for M.L. did not provide for placement in a "regular" or "integrated" kindergarten classroom, as his parents wanted, but in a "self-contained" classroom with other disabled and special education students. The district

court reviewed the IEP team's plan and discussed Plaintiffs' substantive objections to it. While not framing that discussion in terms of a "loss of educational opportunity," the district court made detailed findings of fact to the effect that the program developed by the IEP team was the best placement for M.L., because that placement maximized the academic and non-academic benefits available to him.

The district court's factual findings are enlightening:

> M.L. could hope to gain little academic benefit from a placement in a regular kindergarten classroom focused on developing reading skills. As the District points out, M.L. is almost completely non-verbal. He has virtually no communication skills, and at the time of his evaluation he was not yet toilet trained. His cognitive ability places him at the first percentile level on the Battelle Developmental Inventory. . . . [A] kindergarten classroom geared toward teaching children reading skills is a very different environment from preschool.
>
> The District's experts at the due process hearing uniformly identified the special education placement at Wildwood Elementary as the superior option, and Petitioners offered no expert testimony in rebuttal.
>
> The administrative law judge found that in a regular classroom environment M.L. would interact primarily with his one-on-one aide as opposed to his peers. . . . M.L. lacks the independent skills necessary even to socialize with other children in an integrated classroom setting. . . . The Wildwood special education placement . . . offers the best of both worlds; it

> teaches children with M.L.'s challenges to function without the constant presence of an adult, and it also offers mainstreaming opportunities throughout the week that provide opportunities for socialization with non-handicapped children. The expert testimony in this case is unanimous that Wildwood is the least restrictive option for M.L.
>
> The Court finds no significant non-academic benefit to M.L. from a regular classroom placement.
>
> [T]he Court must . . . find that M.L.'s disruptive presence in the classroom would likely impair the education of the normally developing children.
>
> On balance, the Court cannot find that the District failed to mainstream M.L. to the maximum extent possible in developing his IEP.

The district court's factual findings are consistent with those of the administrative law judge in the due process hearing.[2] Her 73-page Findings of Fact, Conclusions of Law, and Order thoroughly supports the district court's conclusion. Specifically, the administrative law judge found:

> [T]he evidence establishes that [M.L.] has no expected opportunity for making meaningful academic progress in the . . . regular education kindergarten classroom. . . . While some autistic children do well in an integrated classroom if

[2] Plaintiffs did not introduce new evidence in district court. The record before the district court (and before us) was the same record that was before the administrative law judge.

they have high skill levels and can attend to directions, the overwhelming evidence establishes that [M.L.] has difficulty attending to directions, has very low skill levels across all domains, and had difficulty making transitions and learning routines. Therefore, [M.L.'s] educational opportunities in a self-contained classroom are better than those in a [regular] classroom.

The level of support[ ] that [M.L.] needs will interfere with his ability to make non-academic progress in a regular education environment, even with a trained staff assistant. [M.L.] will be dependent on his assistant, which means he will have less opportunity to interact with peers. His day will be spent interacting with the adult assistant and not his peers. Therefore, placement in a general education classroom may in fact be more restrictive than a self-contained classroom.

The evidence establishes that the self-contained classroom at Wildwood will provide [M.L.] with opportunities for socialization and modeling of peers with normal behaviors and communications skills.

Here, the evidence establishes that [M.L.] has extremely disruptive behaviors and must be monitored constantly by a 1:1 aide. . . . Until [M.L.] is able to increase and generalize his receptive and expressive communication skills, and is able to attend to adult directions, he will continue displaying behaviors such as whining, crying, biting, pulling on others, scratching, laying down on the floor and throwing fits. Although this behavior would be addressed by his 1:1 aide, it would nonetheless be distracting to the teacher and the other students.

The findings by district court and by the administrative law judge constitute a factual determination that the program developed by the IEP team was the best placement for M.L. because the academic and non-academic benefits to M.L. were maximized by placement in a self-contained classroom, rather than a regular kindergarten classroom. The evidence supporting that conclusion was overwhelming. This factual determination necessarily means that, even though the IEP plan for M.L. was prepared through a procedurally flawed process, the plan prepared by that team did not result in a loss of educational opportunity for M.L.

It is important to recognize that the district court did not simply determine that Plaintiffs failed to state a substantive violation of the IDEA. The statute requires only that a disabled student be given an "appropriate" education. There is no substantive mandate that a school district provide the best program possible. As the Supreme Court observed in *Board of Education v. Rowley,* 458 U.S. 176 (1982), the statute contains "elaborate and highly specific procedural safeguards" but only "general and somewhat imprecise substantive admonitions." 458 U.S. at 205. Thus, in reviewing actions brought under the statute, courts are instructed to make a twofold inquiry:

> First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

Id. at 206-07. The Court focused on procedure because "adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP." *Id.* at 206. Accordingly, if the process used to prepare an IEP was procedurally correct, the law does not require that the services "be sufficient to maximize each child's potential." *Id.* at 198. The program need only be "reasonably calculated to enable the child to receive educational benefits." *Id.* at 207.

We have concluded that the process used to prepare the IEP for M.L. was not procedurally correct, so a tougher substantive standard should be applied. Our caselaw defines that tougher standard in terms of whether there has been a "loss of educational opportunity." The district court in this case also applied a tougher substantive standard. The district court not only concluded that the program prepared for M.L. was "reasonably calculated" to provide M.L. with a FAPE (the standard applicable in the absence of procedural error, under *Rowley*), but also that the plan was the *best* program for M.L. That being so, the district court properly held that even if there had been error in the composition of the IEP team, M.L. had not been denied a free appropriate public education.

Our caselaw tells us that not all procedural errors amount to violations of the statute. Rather, only a procedural error that results in a lost educational opportunity violates the law. In my view, the factual findings of the district court demonstrate that M.L. did not suffer a lost educational opportunity. The program outlined by the IEP would have maximized both the academic and non-academic benefits for him, would have mainstreamed him to the maximum extent possible, and was uniformly

identified by the experts who testified as superior to the regular classroom placement that M.L.'s parents sought. The statute does not require anything more than that. Even if the process leading to the program was deficient, the program itself was not, and thus the student was not injured – M.L. did not lose an educational opportunity. The IDEA should not be interpreted to impose liability on a school that seeks to provide the best possible program.

The clearly erroneous standard applies to a district court's findings of fact in IDEA cases where, as here, the decision below relied on a written administrative record.[3]

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[3] Judge Gould maintains, at 15685 n.9, that "the question of whether M.L. has 'los[t] an educational opportunity' under the IDEA is a mixed question of law and fact which we review de novo." (citing *Gregory K.*, 811 F.2d at 1310; *Target Range*, 960 F.2d 1482) (alteration in original). Our caselaw, however, provides only that the broad substantive issue – "whether the school district's proposed IEP was a free appropriate public education" – is a mixed question of fact and law that is reviewed de novo. *Gregory K.*, 811 F.2d at 1310; *accord Target Range*, 960 F.2d 1482 (internal quotation marks omitted).

The question before us is more limited: whether the procedural error at issue caused a loss of educational opportunity for M.L. That question is primarily a factual one. It requires consideration of M.L.'s physical and cognitive limitations, the placements proposed in the challenged IEP, the alternative placements, and the expert testimony and other evidence regarding the appropriate placement for M.L. The only legal component is the meaning of the phrase "a lost educational opportunity." The marked predominance of factual over legal issues in our inquiry is confirmed by the relevant portion of Judge Gould's opinion, Section II, which, in five pages of analysis, makes three factual arguments, just one legal argument, and does not cite to a single case, other than for the standard of review. Where a mixed question of law and fact is primarily factual in nature, we apply the clearly erroneous standard of review. *Amanda J.*, 267 F.3d at 887.

The relevant finding of the district court is even narrower than that. The district court found that the placement recommended by the IEP team was the best placement for M.L. This is a purely factual

(Continued on following page)

Gregory K. v. Longview Sch. Dist., 811 F.2d 1307, 1310 (9th Cir. 1987). For a factual finding to be considered "clearly erroneous," we must be left with the "definite and firm conviction that a mistake has been committed." *Amanda J.*, 267 F.3d at 887.

In applying the "loss of educational opportunity" standard to the facts of this case, Judge Gould's opinion does not challenge any of the district court's factual findings, let alone explain how those factual findings are "clearly erroneous." Instead, Judge Gould offers one legal reason and three factual reasons for reversing the district court. I am not persuaded.

The first reason is the statutory preference for mainstreaming to "the maximum extent appropriate." Opinion of Judge Gould, at 15686 (quoting 20 U.S.C. § 1412(a)(5)(A)). Judge Gould builds on the statutory preference for mainstreaming, "when feasible," by highlighting, at 15686-87, the benefits of placing disabled students in regular education settings. As the district court's order expressly stated, however, the "expert testimony in this case is unanimous that Wildwood [special education placement] is the least restrictive option for M.L." Given the entirely one-sided expert testimony regarding the appropriate placement of M.L., the district court was not wrong in concluding that the district did "mainstream M.L. to the maximum extent possible in developing his IEP." Judge Gould does not explain why the district court's detailed discussion of mainstreaming is clearly erroneous or in error under any standard of review.

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determination, not a legal one or a mixed law and fact question. Thus, it should be subject to clear error review.

Nor does Judge Gould identify his reasons for believing that the IEP prepared by the school district failed to mainstream M.L. "to the maximum extent feasible." The naked observation that mainstreaming is preferred and can be beneficial to disabled children does not mean that it is right for every single child. The findings of the district court deal with M.L. and cite unanimous expert testimony that mainstreaming for that child was not appropriate under the circumstances.

The second reason given by Judge Gould is that M.L.'s pre-school teacher in the Tukwila School District, Ms. Wicks, informed the school district that M.L. had made "good progress" in her class and recommended that M.L. remain in a regular education classroom during his kindergarten year. Opinion of Judge Gould, at 15687. Both the district court and the administrative law judge were aware of and considered Ms. Wicks' recommendation, as did the IEP team and the school district. Notwithstanding Ms. Wicks' recommendation, the district court and the administrative law judge both found, as a factual matter, that M.L. would be better served by the IEP prepared by the district. As the administrative law judge observed, even Ms. Wicks "admitted that she did not expect [M.L.] to achieve much academic success in a mainstream placement." And she also recognized that a regular classroom placement would not work for M.L. much longer, since, as noted by the administrative law judge, "in her opinion, the only option [M.L.] would have after one year in an integrated kindergarten would be placement in a self-contained classroom for at least part of the day and mainstream[ing] during non-academic activities." Ms. Wicks' recommendation is not nearly strong enough to support a conclusion that the district court was clearly

erroneous in finding, as the administrative law judge had found, that a self-contained classroom presented the better kindergarten placement for M.L.[4] It is surely not the case that a prior preschool teacher's recommendation is determinative and binding on the school district.[5]

The third reason identified by Judge Gould, at 15687, is simply the fact of the procedural violation: the failure to include a regular classroom teacher in the IEP planning meeting. But the fact that there was a procedural violation says nothing about whether that violation had a substantive impact; it is simply the reason for asking the question. Judge Gould properly rejects the per se rule applied by Judge Alarcon and recognizes that our caselaw establishes that not all procedural violations result in the denial of a FAPE. The fact of the procedural violation is not a fact indicating that M.L. actually lost an educational opportunity as a result.

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[4] Among other factors, I note that Ms. Wicks' recommendation for a regular kindergarten classroom placement was first made before M.L. moved with his family to the Federal Way School District. It is not surprising that the IEP team would take into account what happened during the week M.L. that subsequently spent in Ms. Ramsey's regular kindergarten classroom. As described in Judge Alarcon's opinion, at 15650-51, and more extensively developed in the record, that week in a regular classroom setting was not a positive experience for M.L. or anyone else involved.

[5] It is important to note the procedural posture of this case. We are not sitting in review of an ordinary summary judgment ruling, where we scour the record for disputed issues of material fact. If that were the posture, Ms. Wicks' recommendation might suffice to create a genuine issue of material fact. But here, we are asked to determine whether the district court erred in finding that M.L.'s IEP maximized his educational opportunities. Unless Ms. Wicks' recommendation outweighed the mountain of contrary evidence, including the unanimous expert testimony, we should affirm the district court.

The final reason given by Judge Gould, at 15687, is that "M.L.'s past IEP and placement demonstrated that it was at least possible to conclude that M.L. could be placed in a regular education classroom." Anything is possible, but it is highly unlikely that including a regular classroom teacher on the IEP team would have resulted in a recommendation that M.L. be placed in a regular kindergarten classroom, as I will explain below. More importantly, as the district court found, such a placement would not have been the best placement for M.L. In being denied such a placement, he did not lose an educational opportunity. In broader terms, by proposing a placement which would have better served his needs, the school district did not fail to provide him with a free appropriate public education, the primary requirement of the IDEA.

The principal aim of the statute is to improve the education provided to the affected children. *See* 20 U.S.C. § 1400(c)(1) ("Improving educational results for children with disabilities is an essential element of our national policy. . . . "). That goal is not served by satisfying the parents' desire for a placement which would not have maximized the benefits for the child. The law could have been written to give parents of a disabled child absolute power over the placement decision, but it was not. Certainly parents should play an important role and must be included within the process, and that is a key part of the procedural obligation imposed by IDEA. But IDEA does not and should not impose liability on a school when the IEP provides for the best program for the student, though his parents want a different placement. Even if there was procedural error in preparing this IEP, the student here was not harmed.

If we need to consider what would have happened if a regular classroom teacher had participated on the IEP team, I do not think that there was a realistic possibility that it would have resulted in a different assignment for M.L. If a regular classroom teacher had been present, that teacher along with the rest of the IEP team would necessarily have considered what happened during the five days that M.L. was in Ms. Ramsey's regular kindergarten class in the Federal Way district. An instructional assistant was assigned to M.L. on a one-on-one basis because his needs were so great that he could not be dealt with as part of the class as a whole. There was a different instructional assistant every day, because each one quit after a single day. M.L. was allowed to listen to his favorite music through headphones while in class, to keep him under control, which meant that his involvement with the rest of the class was limited at best. Though M.L.'s mother thought that M.L. was teased by other students, she acknowledged herself that M.L. did not appear to be aware of it, because he had his headphones on most of the time. After five days, the mother removed M.L. from the classroom and refused to return. With that history, the proposition that Ms. Ramsey or any other regular classroom teacher would have attempted to persuade the other IEP team members to place M.L. in another regular kindergarten classroom is dubious.

It is even more unlikely that any such person would have succeeded in persuading the other members of the IEP team. The regular classroom teacher would not have been the final decisionmaker. That teacher – be it Ms. Rowley, Ms. Wicks, or someone else – would have been only one member of the team. And the team had much more to go on than just the reports of M.L.'s previous

teachers. Prior to the IEP team meeting, the district formed a separate multidisciplinary team, including a school psychologist, a speech and language pathologist, a certified occupational therapist, and M.L.'s mother, to evaluate the student. That team also recommended placement in a special education program tailored to M.L.'s needs, rather than in a regular kindergarten classroom. That recommendation matches the *unanimous* judgment of all the experts presented to the administrative law judge and the district court. Under those circumstances, it was not reasonably possible that including a regular classroom teacher in the IEP team meeting would have resulted in an IEP that placed M.L. in a regular education classroom during his kindergarten year.

My colleagues are hesitant to shrug off lightly the procedural error made here and understandably so. The procedural safeguards of the IDEA are important and should be followed in all cases. But in light of the overwhelming evidence that the self-contained placement maximized the academic and non-academic benefits for M.L., I cannot agree that the district court's factual findings were erroneous. Nor can I disagree with the conclusion of the district court that the school district did not deny M.L. a free appropriate public education. Accordingly, I respectfully dissent.

APPENDIX C

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

M.L., a minor; C.D. and S.L., his parents,

Petitioners-Appellants,

v.

FEDERAL WAY SCHOOL DISTRICT; Washington Superintendent of Public Instruction,

Respondents-Appellees.

No. 02-35547

D.C. No. CV-01-00899-JCC

OPINION

Appeal from the United States District Court for the Western District of Washington
John C. Coughenour, Chief Judge, Presiding

Argued and Submitted
August 7, 2003 – Seattle, Washington

Filed September 2, 2003

Before: Arthur L. Alarcón, Ronald M. Gould, and Richard R. Clifton, Circuit Judges.

Opinion by Judge Alarcón

COUNSEL

James E. Lobsenz, Carney Badley Spellman, P.S., Seattle, Washington, for the petitioners-appellants.

Christopher L. Hirst, Preston Gates & Ellis LLP, Seattle, Washington; James J. Dionne, Dionne & Rorick, Seattle, Washington, for the respondents-appellees.

OPINION

ALARCÓN, Senior Circuit Judge:

M.L. and C.D., his mother, and S.L., his father, appeal from the order granting the motion for summary judgment filed by Appellees, Federal Way School District and the Washington Superintendent of Public Instruction. We affirm because we conclude that Appellants have failed to demonstrate that M.L. was denied a free appropriate public education ("FAPE").

I

Unless otherwise indicated, the facts are undisputed. M.L. was born on November 13, 1994. He suffers from autism, mental retardation and macrocephaly.[1] As of February 2001, he was globally delayed across all developmental domains consistent with his cognitive level and had significant behavioral problems. M.L. was almost completely nonverbal, had virtually no communication skills, was not toilet-trained, and had a cognitive ability that placed him at the first percentile level on the Battelle Developmental Inventory.[2] M.L. had not learned to generalize many skills. Dr. Ilene Schwartz, one of the Federal Way School District's experts regarding educational practices for children with autism, indicated that M.L.

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[1] Macrocephaly is a condition that causes the measurement of the distance around the widest part of the skull to be larger than expected for the age and background of the child.

[2] The Battelle Developmental Inventory Screening Test is administered to children six months to eight years old and includes subtests which measure fine and gross motor, adaptive, personal-social, receptive and expressive language, and cognitive skills.

might be able to perform tasks with a familiar service provider, but would be unable to demonstrate those skills when asked to do so in another environment. M.L. made gains in physical therapy between 1997 and 2000. The progress reports from Puget Sound Therapy Services indicate, however, that as of August 2000, M.L. had frequent temper tantrums and displayed aggressive behavior such as hitting and pinching, which interfered with his performance in therapy. M.L.'s occupational therapist recommended that M.L. would benefit from a more structured environment.

M.L. was enrolled in a preschool program in the Tukwila School District in September of 1997. He attended preschool four days per week for approximately two hours per day for three years. Except for a few months in his third year, M.L. was continuously assigned to Jodie Wicks's integrated preschool class through June of 2000.[3] The class followed the same routine each day, using the same songs and activities. Each year the class also included several of the same students and the same instructional assistants.

M.L.'s skills improved over the course of his three years in Ms. Wicks's class. M.L. began to interact more frequently with other children and participated, to a limited extent, in classroom activities. M.L. was teased a few times while enrolled there. During the three years he was enrolled in Ms. Wicks's class, he was assigned a one-on-one instructional assistant who remained with him throughout

[3] An "integrated" or "regular" classroom consists of both typically developing children and a small number of disabled children. They are taught by a "regular education" teacher.

the day. M.L. displayed increasingly aggressive behavior during that time. This conduct was documented by many of his service providers. His level of aggression escalated when he was frustrated or given more challenging tasks. He would cry and whine or bite and scratch his instructional assistant. He mouthed many objects and at least on one occasion bit another child. Lai Doo, M.L.'s in-home therapist, testified that as M.L.'s level of communication increased, his level of aggression decreased. However, Ms. Doo also stated that M.L.'s "level of aggression seem[ed] to be a lot more severe than the others that [she had] seen."

Because M.L. is disabled, the Tukwila School District was required by 20 U.S.C. § 1414(d)(1)(A), to create an individualized education program ("IEP") each year that stated M.L.'s "present levels of educational performance," outlined the "special education and related services . . . to be provided to [M.L.]," and set forth "measurable annual goals." The composition of the "IEP team," the group of people who are required to participate in the creation of the IEP, is dictated by 20 U.S.C. § 1414(d)(1)(B). On January 31, 2000, the IEP team for the Tukwila School District, which included Ms. Wicks, prepared an IEP for M.L.'s initial placement for the 2000-2001 academic year. Under the Tukwila School District IEP, M.L. was to be enrolled in September in an integrated kindergarten class for 130 minutes, four times per week and was to receive additional therapy and instructional services.

Around July 30, 2000, M.L. and his family moved to the Federal Way School District, prior to M.L.'s enrollment in kindergarten in the Tukwila School District. M.L. began kindergarten on September 5, 2000, at the Mark Twain Elementary School in the Federal Way School District. The Federal Way School District attempted to implement the

Tukwila School District's IEP until it was due to expire on September 30, 2000. Accordingly, M.L. was placed in Sandy Ramsey's integrated kindergarten class. Ms. Ramsey is duly certified as a regular and special education teacher.

At C.D.'s suggestion, Ms. Ramsey controlled M.L.'s behavior in class by letting him listen to his favorite music on his headphones. The Federal Way School District hired a series of one-on-one instructional assistants to work with M.L. Each of them quit after working with him for one day.

During the majority of the five days M.L. was enrolled at the Mark Twain School, C.D. attended class with M.L. On September 5, 2000, C.D. witnessed two boys teasing M.L. She discussed this incident with Ms. Ramsey and Pat Warden, Ms. Ramsey's classroom assistant. Ms. Ramsey responded that she "would make a note and make it a priority to keep observing – keep an eye on these children and a better eye on [M.L.] to see if anything continued to happen so she could address any incidents that might happen." On September 6, 2000, C.D. observed more children teasing M.L. at recess. She reported this conduct to Ms. Ramsey and Ms. Warden. C.D. testified, however, that M.L. was "happy as a little lark" during recess.

On September 7, 2000, C.D. again observed children teasing M.L. at recess and during class time. She discussed this conduct with Ms. Ramsey. Ms. Ramsey told C.D. that she "had not witnessed any teasing of M.L. during class, but would continue to watch for it and intervene if necessary." Ms. Ramsey informed C.D. that "policies were in place regarding teasing and that she did not allow such behavior in her class."

C.D. witnessed additional teasing incidents on September 8 and September 11, 2000. She reported these events to Ms. Ramsey. Ms. Ramsey replied that "she would keep an eye on [M.L.] and would take care of it." Ms. Ramsey did not take any action regarding the teasing incidents. C.D. testified that there was no evidence that M.L. was actually affected by the teasing and that "because he had his headphones on most of the time he was being teased . . . [she] didn't know if he even heard it."

The morning of September 12, 2000, C.D. called Diane Conn, the Vice-Principal of the Mark Twain School, to report a teasing incident that had allegedly occurred the previous day. Ms. Conn suggested that C.D. contact Ms. Ramsey. Ms. Conn then contacted Ms. Ramsey and advised her to talk to C.D.

On September 13, 2000, Ms. Ramsey telephoned C.D. to discuss her complaint that M.L. had been teased on September 11, 2000. Ms. Ramsey informed C.D. that the teasing that took place on September 11, 2000 was the only incident that she had observed. Ms. Ramsey testified that during that conversation, she requested that C.D. give her the first opportunity to take care of problems concerning M.L. before C.D. took the matter further. M.L. did not return to the Mark Twain School after September 11, 2000. C.D. did not speak with any Federal Way School District administrator before removing her child from the school.

On or about September 17, 2000, the Federal Way School District offered to place M.L. at the Wildwood Elementary School in a self-contained classroom[4] taught

[4] A "self-contained" classroom consists of only disabled students.

by Teresa Thomas, a certified special education teacher with experience in teaching autistic children. C.D. refused to enroll M.L. in the Wildwood Elementary School because she believed that the self-contained class did not provide for sufficient participation with regular education students. She thought that "it could be potentially dangerous for [M.L.]" to interact with the other students in the self-contained class. C.D. did not visit Ms. Thomas's class at any time.

After M.L.'s Tukwila School District IEP expired on September 30, 2000, a multidisciplinary team ("MDT"), which included C.D., met on October 6, 2000, to determine whether M.L. qualified for special education services. The evaluation was based upon extensive records from M.L.'s care-providers, identified by C.D.; the discussions between Jan Rutledge, a Federal Way School District Psychologist, and both Ms. Wicks and the school psychologist at the Tukwila School District; the Tukwila School District IEP; an interview with C.D.; and a two-hour observation of M.L. by the MDT.

After evaluating M.L., the MDT drafted a Special Education Evaluation Report which contained recommendations for M.L.'s education. The MDT recommended that M.L. be placed in a special education program that offered a small class size, provided visual supports, and predictable and consistent schedules and routines. The MDT, including C.D. and M.L., met again on October 13, 2000, to discuss the results of the evaluation and the MDT's recommendations.

On or about, October 25, 2000, Dr. Drinkwater again offered to place M.L. at the Wildwood Elementary School, Mark Twain Elementary School, or several other schools

within the Federal Way School District, pending completion of a new IEP. C.D. refused each of these suggestions. On October 27, 2000, M.L.'s parents requested that the Federal Way School District provide an independent evaluation of M.L. In response, the District filed a request for a due process hearing on November 9, 2000.

On November 1, 2000, Dr. Lee Saffrey, a district program specialist, mailed M.L.'s parents a letter proposing an IEP meeting for November 13, 2000, at 8 a.m. C.D. faxed a letter to Dr. Saffrey on November 1, 2000, in which she stated that she would not attend any IEP meetings unless "the staff from [her] child's neighborhood school (Starlake Elementary)" was present and only if the meetings were held at the Federal Way School District administration offices or the Starlake Elementary School. C.D. also indicated that she would not be available on November 13th until after 6:00 p.m. On November 2, 2000, the Federal Way School District notified C.D. that it changed the location of the meeting to its administrative offices and that the meeting would occur at 4:00 p.m. on November 13, 2000.

On November 6, 2000, C.D. faxed a letter to the Federal Way School District regarding her availability for the IEP meeting. Although C.D. did not work outside the home and was the parent primarily involved in monitoring M.L.'s education, including attending school with him for his first five days at the Mark Twain Elementary School, C.D. asserted that she would not be able to attend the IEP meeting at 4:00 p.m. She instead proposed times for the meeting that were clearly not within the District's regular hours such as between 4:15 *a.m.* and 5:15 *a.m.* from Monday through Friday, or on the weekends. The Federal Way School District conducted such meetings between 7:00

a.m. and 4:00 p.m., Monday through Friday. The Federal Way School District responded that M.L.'s parents could participate via a conference call. C.D. replied that she would not be able to participate in a conference call at any time on November 13, 2000.

The Administrative Law Judge ("ALJ") found that the assertion that M.L.'s parents could not attend the IEP meeting at 4:00 p.m. was not credible. S.L.'s timesheet records from his employer indicate that on November 13, 2000 his workday ended at 2:58 p.m., allowing him sufficient time to attend a meeting at 4:00 p.m. C.D. claimed that she had to bring M.L. to an appointment at that time, however, a fax was sent from C.D.'s home at 5:05 p.m. bearing C.D.'s handwriting. The fax journal was printed at 5:10 p.m.

The Federal Way School District's IEP meeting was held on November 13, 2000, at 4:00 p.m. M.L.'s parents did not attend. A letter written by Ms. Wicks on May 10, 2000 was considered by the IEP team. In her letter, Ms. Wicks recommended that M.L. remain in a general education classroom during his kindergarten year. Although Ms. Thomas was present at the IEP meeting, a regular education teacher did not attend.

After reviewing M.L.'s previous IEP and records, the Federal Way School District's IEP team concluded that M.L. "would do better in a smaller setting with the opportunity to work on specific skill areas" and recommended placement in Ms. Thomas's self-contained classroom at the Wildwood Elementary School. The IEP provided for mainstreaming

opportunities[5] during lunch, recess, assemblies, music, library, and school activities. The Wildwood program incorporated specialized strategies for teaching autistic children and was taught by a teacher and assistants who had special training in teaching autistic children. The self-contained classroom was smaller than an integrated kindergarten and was specially designed for students ranging from kindergarten through sixth grade.

The Federal Way School District mailed M.L.'s parents a copy of the IEP on November 17, 2000. Dr. Drinkwater also enclosed a letter offering M.L.'s parents the opportunity to discuss and refine further the IEP prepared on November 13, 2000. M.L.'s parents did not respond.

In February 2001, an eight-day due process hearing was held before an ALJ pursuant to the Individuals With Disabilities Education Act ("IDEA"). M.L.'s parents contended that the Federal Way School District had violated the Act by, *inter alia,* providing an inadequate evaluation of M.L. and failing to provide M.L.'s parents an opportunity to meaningfully participate in the development of the IEP. The ALJ determined that the Federal Way School District had not violated the IDEA and denied Parents' motion for reconsideration.

Pursuant to 20 U.S.C. § 1415(i), Parents timely appealed the ALJ's final decision to the United States District Court for the Western District of Washington. In their complaint, they asserted that the Federal Way School District had engaged in procedural and substantive violations of the IDEA. In a motion for partial summary

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[5] "Mainstreaming" is a term used to describe opportunities for disabled students to engage in activities with non-disabled students.

judgment, M.L.'s parents asked the district court to set aside the IEP adopted by the Federal Way School District on November 13, 2000; direct the Federal Way School District to assemble a new IEP team that properly follows the procedural requirements of the IDEA; "direct the District to continue to place M.L. in a regular education classroom;" and "direct the District to implement procedures that would ensure detection and prevention of teasing of M.L. by his classmates." M.L.'s parents also sought damages, including reimbursement of education costs for M.L., and attorneys fees for the Federal Way School District's alleged failure to provide M.L. a FAPE.

The district court granted the Federal Way School District's motion for summary judgment, holding that the Federal Way School District "did not significantly deviate from the IDEA's required procedures in formulating M.L.'s IEP" and that the Federal Way School District did not deny M.L. a FAPE.

II

The Federal Way School District filed a motion with this court on December 24, 2002, asking to correct the incomplete certified transcript, which omitted the testimony of Dianne Conn. In their supplemental letter brief, M.L.'s parents argue that normally the reviewing court will not supplement the record with material not considered by the trial court. We have previously held, however, that "[i]n reviewing the record, this court must examine the administrative record as *a whole*. . . ." *Gonzalez v. Sullivan,* 914 F.2d 1197, 1200 (9th Cir. 1990) (emphasis added). *See also* 20 U.S.C. § 1415(i)(2)(B)(1) (stating that in reaching its decision, a reviewing court is required to

"receive the records of the [state] administrative proceedings"). In addition, Rule 10(e) of the Federal Rules of Appellate Procedure allows the record to be corrected if "anything material to either party is omitted from or misstated in the record by error or accident[.]" Ms. Conn's testimony was erroneously omitted from the record considered by the district court. Since our review of the district court's determination regarding the appropriateness of a special education placement is de novo and we are required to consider the entire administrative record, we granted the district's motion to complete the certified record.

III

In a judicial proceeding under the IDEA, a reviewing court is required to conduct a modified de novo review, giving "due weight" to the underlying administrative proceedings. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley,* 458 U.S. 176, 206 (1982) [hereinafter *Rowley*]. The appropriateness of a special education placement under the IDEA is reviewed de novo. *W.G. v. Bd. of Trustees of Target Range Sch. Dist. No. 23,* 960 F.2d 1479, 1483 (9th Cir. 1992) [hereinafter *Target Range*]. Where, as here, the district court relies on a written record of administrative proceedings, the clearly erroneous standard applies to the district court's findings of fact. *Gregory K. v. Longview Sch. Dist.,* 811 F.2d 1307, 1310 (9th Cir. 1987). Here, where the district court did not receive any additional evidence or testimony, we stand in the same shoes as the district court in reviewing the administrative record and may, therefore, accept the conclusions of the ALJ and district court that are supported by the record and reject those that are not. *Cf.*

M.M. ex rel. D.M. v. Sch. Dist. of Greenville County, 303 F.3d 523, 531 (4th Cir. 2002) ("[W]e need not defer to factual recitations made by a district court from the administrative record, because that court stands in no better position than do we in reviewing the record."); *Great W. Bank v. Office of Thrift Supervision,* 916 F.2d 1421, 1426 (9th Cir. 1990) ("'District court review of agency action is generally accorded no particular deference, because the district court, limited to the administrative record, is in no better position to review the agency than the court of appeals.'") (quoting *Asarco, Inc. v. EPA,* 616 F.2d 1153, 1161 (9th Cir. 1980)). As the losing parties before the district court, M.L.'s parents bear the burden of demonstrating that the Federal Way School District did not comply with the IDEA. *Clyde K. v. Puyallup Sch. Dist., No. 3,* 35 F.3d 1396, 1399 (9th Cir. 1994). The district court had jurisdiction over this matter pursuant to 20 U.S.C. § 1415(i)(2)(A). We have appellate jurisdiction under 28 U.S.C. § 1291.

IV

The IDEA and its implementing regulations provide federal money to assist state and local agencies in educating children with disabilities. *Ojai Unified Sch. Dist. v. Jackson,* 4 F.3d 1467, 1469 (9th Cir. 1993). One of the primary purposes of the IDEA is to "ensure that all children with disabilities have available to them a [FAPE] that emphasizes special education and related services designed to meet their unique needs[.]" 20 U.S.C. § 1400(d)(1)(A) (2003). This goal is "achieved through the development of an . . . IEP for each child with a disability." *Ojai,* 4 F.3d at 1469. To ensure that a child receives a FAPE in accordance with the IDEA, a state must comply

both procedurally and substantively with the IDEA. *Rowley,* 458 U.S. at 206-07. "State standards that are not inconsistent with federal standards are also enforceable in federal court." *Target Range,* 960 F.2d at 1483.

We must first determine whether the Federal Way School District has met the "rigorous procedural requirements of the IDEA. . . ." *Union Sch. Dist. v. Smith,* 15 F.3d 1519, 1524 (9th Cir. 1994). "Not every procedural violation [] is sufficient to support a finding that the child in question was denied a FAPE." *Amanda J. v. Clark County Sch. Dist.,* 267 F.3d 877, 892 (9th Cir. 2001). "However, procedural inadequacies that result in the loss of educational opportunity, or seriously infringe the parents' opportunity to participate in the IEP formulation process, clearly result in the denial of a FAPE." *Target Range,* 960 F.2d at 1484 (internal citations omitted). If this court determines that the Federal Way School District did not substantially violate the procedural requirements of the IDEA, the court must then decide whether the IEP developed by the Federal Way School District meets the Act's substantive requirement, that the IEP is "reasonably calculated to enable the child to receive educational benefits." *Rowley,* 458 U.S. at 206-07.

The IDEA specifies the individuals who are required to be present during the development of a disabled child's IEP. Before 1997, the school district was obligated to include the child's current teacher as a member of the IEP team. 20 U.S.C. § 1401(a)(20) (1996).[6] *See also Shapiro ex*

[6] 20 U.S.C. § 1401(a)(20) (1996) reads in pertinent part: "The term 'individualized education program' means a written statement for each child with a disability developed in any meeting by . . . the teacher[.]"

rel. Shapiro v. Paradise Valley Unified Sch. Dist. No. 69, 317 F.3d 1072, 1076-77 (9th Cir. 2003) (holding that 20 U.S.C. § 1401(a)(20) requires that the disabled child's current teacher must be included on the IEP team). In 1997, Congress revised the statute to require the inclusion of "at least one regular education teacher of such child (if the child is, *or may be,* participating in the regular education environment)" and "at least one special education teacher, or where appropriate, at least one special education provider of such child." 20 U.S.C. § 1414(d)(1)(B) (2003) (emphasis added).

M.L.'s parents assert that the Federal Way School District violated procedural requirements of the IDEA by failing to include a regular education teacher and someone with first-hand knowledge of M.L. on the IEP team and by deciding to place M.L. in a self-contained classroom before the IEP meeting. The Federal Way School District contends that it did not violate the procedures of the IDEA because there was a regular education teacher on the IEP team. This teacher did not participate in any of the IEP team meetings. In the alternative, the Federal Way School District asserts that any procedural violations did not result in a loss of an educational opportunity for M.L.

A.

M.L.'s parents concede that M.L. was not enrolled in a regular classroom at the time of the IEP meeting and thus had no current regular education teacher. They point out, however, that the statute does not require that a child be currently enrolled in a regular classroom at the time of the meeting. Section 1414(d)(1)(B) requires the participation of a regular education teacher on the IEP team if the child

"may be" participating in a regular education classroom. M.L.'s parents interpret the meaning of the term "may be" to mean a "possibility" that M.L. would be placed in a regular education environment. M.L.'s parents conclude that this possibility existed since the Tukwila School District's IEP had recommended that M.L. be placed in a regular education kindergarten classroom.[7]

In its answering brief, the Federal Way School District has attempted to rebut M.L.'s parents' interpretation of the statute. However, in presenting its arguments, the Federal Way School District has ignored the plain meaning of the statute. Webster's Dictionary defines "may" as to "be in some degree likely." Webster's Third New International Dictionary 1396 (4th ed. 1976). The record shows that the IEP developed by the Tukwila School District for M.L. required placing him in a regular kindergarten classroom; M.L. had attended a regular preschool classroom for three years; after his family moved to the Federal Way School District, M.L. was placed in Ms. Ramsey's regular classroom; and M.L.'s parents had rejected placement in a self-contained classroom at the Wildwood

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[7] The district court relied on *Clyde K.*, 35 F.3d at 1400, to reach its holding that since "[i]n the case of a student who is new to the district, it is permissible to include only teachers who are likely to be entrusted with him in the new placement." In 1994, when *Clyde K.* was decided, a school district was only required to include the child's teacher on the IEP team. The Act was revised in 1997 by Congress to require the presence of both a regular and special education teacher at the IEP meeting. Therefore, the holding of *Clyde K.* is inapposite to this matter. Similarly, our recent decisions in *Ms. S. v. Vashon Island Sch. Dist.*, ___ F.3d ___ (9th Cir. July 31, 2003) and *Shapiro*, 317 F.3d 1072, do not affect this action since both decisions relied on the pre-1997 version of the IDEA to reach their holdings that the presence of the student's "current teacher" is required at the IEP meeting.

Elementary School and expressed a strong preference for mainstreaming. In light of these facts, the record supports the inference that it was in "some degree likely" that M.L. would be placed in a regular education classroom.

Congress revised the IDEA specifically to emphasize the role a regular education teacher performs on the IEP team. This requirement is therefore not merely technical, but serves an important function in providing a FAPE for a disabled child. The fact that the name of a regular education teacher, who did not participate in the IEP meeting, was included on a list of IEP team members is not sufficient to fulfill the central role that regular education teachers can play in educating children with disabilities. We are persuaded that the Federal Way School District's failure to include a regular education teacher on the IEP team was a procedural violation of the IDEA. "Procedural flaws do not automatically require a finding of a denial of a FAPE. However, procedural inadequacies that result in the loss of educational opportunity or seriously infringe the parents' opportunity to participate in the IEP formulation process clearly result in the denial of a FAPE." *Target Range,* 960 F.2d at 1484 (internal citations omitted).[8]

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[8] M.L.'s parents do not assert that the procedural violation "seriously infringe[d]" on their ability to participate in the process of developing the IEP. The Federal Way School District was authorized to go forward with an IEP meeting without the child's parent when it was unable to convince them to attend. 34 C.F.R. § 300.345 (authorizing a school district to proceed with an IEP meeting without the presence of a child's parent if the school district is unable to convince the parents to attend following attempts of record to do so). The Federal Way School District made extensive attempts to include parents in the meeting, to no avail. In this appeal, M.L.'s parents do not contest the ALJ's finding that M.L.'s parents' reasons for missing the meeting were not credible.

(Continued on following page)

M.L.'s parents assert that M.L.'s lost educational opportunity was the district's failure to include him in a regular education classroom. This contention is true only if M.L.'s enrollment in the self-contained classroom would result in a denial of a FAPE or if the IEP meeting's outcome would have been different had a regular education teacher, or someone with firsthand knowledge of M.L. been present at the meeting. *See, e.g., Shapiro,* 317 F.3d at 1079 ("The [school district's] failure to include the persons most knowledgeable about [the student's] educational levels and needs . . . at the June 8 IEP meeting and its concomitant creation of a defective IEP resulted in lost educational opportunity for [the student]."); *M.M.,* 303 F.3d at 534 ("If a disabled child received (or was offered) a FAPE in spite of a technical violation of the IDEA, the school district has fulfilled its statutory obligations."); *Heather S. v. Wisconsin,* 125 F.3d 1045, 1059-60 (7th Cir. 1997) (holding that since the District had not denied the student a FAPE, that the procedural violation could not have resulted in a loss of educational opportunity).

M.L.'s parents fault the IEP for having "no opportunity for integration or mainstreaming with non-disabled children." This description mischaracterizes the IEP. In fact, the IEP provided for seventy-five minutes of participation in the general education environment per week including "lunch time, recess, assemblies, music, library, and school activities," and could be revised and adapted in accordance with M.L.'s needs.

Therefore, the Federal Way School District's decision to hold the IEP meeting without M.L.'s parents did not deny M.L. a FAPE.

M.L.'s parents also assert that M.L. should have been in a regular education kindergarten classroom because he had made significant progress while in Ms. Wicks's preschool class in the Tukwila School District and Ms. Wicks had recommended that M.L. continue to be mainstreamed. There is ample evidence in the record, however, that the Federal Way School District's IEP team's decision to place M.L. in the Wildwood program was indeed the best placement for him. In addition, the record supports the conclusion that had either Ms. Ramsey or Ms. Wicks been present at the meeting, the IEP team would have reached the same conclusion regarding M.L.'s placement. In an e-mail to Dr. Drinkwater, dated September 5, 2000, Ms. Ramsey wrote:

> I have never had such a low functioning student in all my 11 years in Spec. ed . . . even when I was teaching the Down's Syndrome classes. What is the process the MDT needs to go through to determine his best placement. I know mom wants him to be treated like any "K" student, but on the other hand, she wants everything I do, changed, (to be more like a self-contained preschool setting). I'm really puzzled by this student, and how to best help his many needs.

Furthermore, although Ms. Wicks testified at the due process hearing that she thought it was critical for M.L. to be placed in an integrated kindergarten, she admitted that she did not expect M.L. to achieve much academic success in a mainstream placement. Substantial evidence in the record supports the conclusion that the District's procedural violation did not result in a loss of an educational opportunity for M.L. The Federal Way School District's failure to include a regular education teacher on the IEP team did not deny M.L. a FAPE.

B.

M.L.'s parents further contend that the Federal Way School District violated the procedures of the IDEA by failing to "include anyone who had ever taught or cared for M.L." on the IEP team. The requirement that one with knowledge of the child be included on the IEP team is aimed at enabling meaningful parent involvement in the IEP development process. *See, e.g., Rowley,* 458 U.S. at 205 (describing the substantial emphasis placed by Congress "upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process"); *Amanda J.,* 267 F.3d at 891-92 (9th Cir. 2001) ("The critical nature of the provisions protecting parental involvement is highlighted when they are considered in light of the stated purposes of the IDEA. To accomplish the IDEA's goal of ensuring that [all children with disabilities receive a FAPE] . . . , those individuals who have first-hand knowledge of the child's needs . . . must be involved in the IEP creation process. The procedural safeguards facilitate this objective [and] . . . . ensure that the rights of children with disabilities and their parents or guardians are protected.") (quotation marks and citations omitted); *Doe ex rel. Doe v. Defendant I,* 898 F.2d 1186, 1191 (6th Cir. 1990) ("Adequate parental involvement and participation in formulating an IEP, not adherence to [a] laundry list of items . . . , appear to be the Court's primary concern in requiring that procedures be strictly followed."). The statute requires that "other individuals who have knowledge or special expertise regarding the child" should be included on the IEP team "at the discretion of the parent or the agency[.]" 20 U.S.C. § 1414(d)(1)(B)(vi). *See also* 34 C.F.R. § 300.552(a)(1) (requiring the placement decision regarding a child with a disability to be "made by a group of persons, including the

parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options"). The Federal Way School District went to great lengths to include M.L.'s parents in the IEP meeting. M.L.'s parents refused to attend the 4:00 p.m. meeting scheduled by the Federal Way School District. Instead, C.D. insisted that the meeting be scheduled at times such as 4:15 a.m. or on the weekend. The record shows that M.L.'s parents could have attended the meeting at 4:00 p.m. M.L.'s parents have not cited to any authority that requires the Federal Way School District to track down someone with firsthand knowledge of M.L. to attend the IEP meeting when M.L.'s parents were available but refused to attend. *Cf. Roland M. v. The Concord Sch. Comm.*, 910 F.2d 983, 995 (1st Cir. 1990) (holding that when the student's parents had a relationship with the student's teacher who they failed to invite to their IEP meeting "[t]he law ought not to abet parties who block assembly of the required team and then, dissatisfied with the ensuing IEP, attempt to jettison it because of problems created by their own obstructionism"). The Federal Way School District's failure to include someone with firsthand knowledge of M.L. on the IEP team was not a procedural violation of the IDEA.

C.

M.L.'s parents further assert that the Federal Way School District violated the principle that a school district may not make a placement decision first and then devise an IEP afterwards. The Federal Way School District acknowledges that school officials must come to the IEP table with an open mind. However, the Federal Way School District, relying on *Doyle v. Arlington County Sch.*

Bd., 806 F. Supp. 1253 (E.D. Va. 1992), *aff'd*, 39 F.3d 1176 (4th Cir. 1994), contends that "this does not mean that they should come to the IEP table with a blank mind . . . . [but] can, and should, have given some thought to that placement." *Id.* at 1262. We agree.

The Fourth Circuit held in *Spielberg ex rel. Spielberg v. Henrico County Pub. Schs.*, 853 F.2d 256, 259 (4th Cir. 1988) that a school district may not determine a placement for the student before the IEP meeting. This holding was premised on the "spirit and intent of the [IDEA], which emphasizes parental involvement." *Id.* at 259. Here, the Federal Way School District made every effort to include M.L.'s parents in the IEP meeting. Under Washington law, the Federal Way School District is required to develop an evaluation report which must include, among other elements, "the recommended special education and related services needed by the student including specially designed instruction." Wash. Admin. Code. § 392-172-10905 (2003). In addition, in accordance with Washington Administrative Code § 392-172-302, the Federal Way School District notified M.L.'s parents that it intended to implement the Student's IEP at Wildwood. M.L.'s parents do not contend that Washington law violates the IDEA. Therefore, the fact that the Federal Way School District included special education teachers from M.L.'s potential future school on the IEP team is not evidence that the Federal Way School District predetermined M.L.'s placement and was not a procedural violation of the IDEA.

V

At the due process hearing Dr. Drinkwater testified that "[t]he District's vision is that all students will read.

That's the expectation. . . ." M.L.'s Parents contend that this statement is evidence that the Federal Way School District decided to exclude M.L. from a regular education classroom based on its knowledge that M.L. would not learn to read by the end of kindergarten. M.L.'s parents contend that this alleged policy violated the IDEA's requirement that the agency conducting the evaluation of the disabled child "shall . . . not use any single procedure as the sole criterion for . . . determining an appropriate educational program for the child[.]" 20 U.S.C. § 1414(b)(2).

The Federal Way School District asserts that it does not have a policy that it only accepts students into kindergarten who will be able to read by the end of the year, and no such policy was used to determine M.L.'s placement. The Federal Way School District claims that Dr. Drinkwater's statement was merely evidence that the school district has articulated academic expectations for its students, which it is allowed to do under the Act. *See Roland M.*, 910 F.2d at 992 (noting that "[a]cademic standards are matters peculiarly within the expertise of . . . local educational authorities").

Dr. Drinkwater testified that:

> A: If you are asking if the district has a policy about not entering kindergarten students, they don't. Anyone who is of age, of kindergarten age, can be enrolled in the district. . . . [A] child who is five years old by August 31st of that school year can enter as a kindergarten student.
>
> Q: . . . [E]ven though we don't expect that child to be meeting the reading levels or reading goals that we have for the class in general, it

still is appropriate to put him in that class; is that right?

A: You asked me if they were allowed to get into kindergarten, and I said the district has a five year policy. The District doesn't have a policy about which particular kindergarten a student could or couldn't get into, not policy.

M.L.'s parents claim that Dr. Drinkwater's testimony that "anyone who is of age . . . can be enrolled in the district" does not mean, as implied by the district court, that anyone of kindergarten age could enroll in a regular education classroom, but merely that one could enroll in the Federal Way School District. M.L.'s parents' interpretation of Dr. Drinkwater's testimony strains credulity. Dr. Drinkwater specifically stated that the district had "*no policy*" regarding "which particular kindergarten a student could or couldn't get into." (emphasis added). M.L.'s parents have offered no evidence to support their contention that an inflexible reading policy prevented the Federal Way School District from enrolling M.L. in a regular classroom. Therefore, M.L.'s parents have failed to demonstrate that the Federal Way School District determined M.L.'s placement based on a rigid policy or criteria.

VI

M.L.'s parents contend that by including M.L. in a self-contained classroom, the Federal Way School District failed to place him in the least restrictive environment as required by the Act. The IDEA "requires participating States to educate handicapped children with non-handicapped children whenever possible." *Rowley,* 458 U.S. at 202. However, "[t]he IDEA's preference for mainstreaming is not an absolute commandment." *Poolaw v.*

Bishop, 67 F.3d 830, 836 (9th Cir. 1995). "In some cases, such as where the child's handicap is particularly severe, it will be impossible to provide any meaningful education to the student in a mainstream environment. In these situations continued mainstreaming would be inappropriate and educators may recommend placing the child in a special education environment." *Id.* at 834.

We have adopted a four-factor balancing test to determine whether a school district has complied with the IDEA's mainstreaming requirement.[9] The court must consider "(1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect [the student] had on the teacher and children in the regular class; and (4) the costs of mainstreaming [the student]." *Sacramento City Unified Sch. Dist., Bd. of Educ. v. Rachel H. ex rel. Holland*, 14 F.3d 1398, 1404 (9th Cir. 1994) [hereinafter *Rachel H.*].[10]

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[9] The mainstreaming provision of the IDEA requires a disabled child to be placed in the "[l]east restrictive environment" and that:

> To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412(a)(5)(A) (2003).

[10] The parties agree that the cost of placing M.L. in a regular education classroom is not significantly different from the cost of the Wildwood special education placement. Therefore, we need only balance the first three factors to determine whether the Federal Way School District complied with the mainstreaming requirements of the IDEA.

A.

M.L.'s parents assert that the district court and ALJ erred by analyzing "educational benefit" narrowly in terms of academic achievements. However, this court has analyzed the first *Rachel H.* factor specifically by evaluating the *academic* benefits to the child of mainstreaming. *See Clyde K.*, 35 F.3d at 1401 (stating that when the court applies the four *Rachel H.* factors, it looks first to "the academic benefits of placement in a mainstream setting, with any supplementary aides and services that might be appropriate"). *See also Rowley,* 458 U.S. at 207 n.28 (observing that "achievement of passing marks and advancement from grade to grade" is an "important factor in determining educational benefit"); *Beth B. v. Van Clay,* 282 F.3d 493, 499 (7th Cir. 2002) (explaining that the fact that the student's "academic progress was virtually non-existent" weighed against mainstreaming).

M.L.'s parents maintain that a segregated classroom enjoys no educational advantage over a regular classroom for M.L. This contention is not supported by the record. M.L.'s parents have not adduced any evidence that there would be an educational benefit in placing M.L. in a regular classroom. To the contrary, the record supports the conclusion that M.L. would receive significant academic benefits from the Wildwood program. M.L. has virtually no communication skills and has a cognitive ability that places him at the first percentile level on the Battelle Developmental Inventory. The Federal Way School District presented testimony from two experts that the Wildwood program would help M.L. learn generalization and communication skills that he would not learn if mainstreamed. In addition, Ms. Wicks admitted that she did not expect M.L. to achieve much academic success in a

mainstream placement. The district court pointed out that "The District's experts at the due process hearing uniformly identified the special education placement at Wildwood Elementary as the superior option, and Petitioners offered no expert testimony in rebuttal." Accordingly, the first *Rachel H.* factor weighs against placing M.L. in a regular education classroom.

B.

M.L.'s parents contend that in both types of classrooms, M.L. would work with a one-on-one aide at all times, leading to equally limited contact with other students. Thus, M.L.'s parents conclude that where the non-academic benefit to M.L. is the same in each program, the preference for mainstreaming must control. M.L.'s parents also assert that M.L. would derive significant non-academic benefits from his ability to interact with other children of the same age in a regular education classroom, in contrast to the self-contained classroom at Wildwood Elementary School, which had only one other kindergarten student at the time M.L. was to be enrolled. The Federal Way School District argues that, weighed against the other *Rachel H.* factors, the opportunity for exposure to non-handicapped children alone is not sufficient to constitute substantial non-academic benefits that justify mainstreaming a child.

School districts must balance the IDEA's preference for mainstreaming disabled children with the Act's requirement that all students receive a FAPE that is tailored to each child's unique needs. *Compare* 20 U.S.C. § 1412(a)(5) *with id.* § 1412(a)(1). Although a disabled child may receive a very limited educational benefit from a regular education

program, he or she "may benefit enormously from the language models that his nonhandicapped peers provide for him. In such a case, the benefit that the child receives from mainstreaming may tip the balance in favor of mainstreaming, even if the child cannot flourish academically." *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1049 (5th Cir. 1989). However, "[i]n some cases, such as where the child's handicap is particularly severe, it will be impossible to provide any meaningful education to the student in a mainstream environment." *Poolaw*, 67 F.3d at 834.

Here, the great weight of evidence in the record points to the conclusion that the only advantage to M.L. of placement in a regular classroom "would be that [he] is sitting next to a nonhandicapped student." *Daniel R.R.*, 874 F.2d at 1049. The Federal Way School District has presented substantial evidence that supports the conclusion that because of M.L.'s extremely limited communication and independent skills, he would receive a greater non-academic benefit from placement in the Wildwood program. Ms. Wicks testified that "it's so critical for M.L. to be around typical children for not only the socialization, but to be around good behavioral models and to learn to imitate good social behavior." However, Dr. Schwartz testified that "based on the evaluations, [M.L.] doesn't seem to have many independent skills, which means that he can't play appropriately, which means that while other children are playing he won't be able to do that." This testimony suggests that M.L.'s lack of communication and independent skills is so severe that even if he is exposed to typically-developing children he would not be able take advantage of the opportunity to learn to imitate their behavior. Dr. Schwartz also explained that the Wildwood

program would focus on teaching M.L. how to work independently, apart from a one-on-one aide, and would focus on techniques that taught him how to interact with his peers, skills that would not be developed in a regular education classroom. The ALJ found Dr. Schwartz's testimony credible and M.L.'s parents have not presented any contradictory evidence.

We cannot interpret the preference toward mainstreaming to require the Federal Way School District to enroll M.L. in a regular education classroom, when to do so would result in a failure to meet the majority of his unique needs. Therefore, the second *Rachel H.* factor weighs in favor of placing M.L. in the Wildwood program.

C.

Although M.L.'s parents admit that M.L. bites, kicks, and bruises his caretakers, they assert that "the fact that M.L. occasionally is aggressive towards his assigned aide does not mean that such conduct will require the attention of the regular teacher in the classroom." In addition, they contend that M.L. is only aggressive when he is prevented from interacting with other children and that there has only been one incident in three years when M.L. was aggressive towards another student. In order to determine whether a disabled child has a negative effect on a regular classroom, the test is not whether the student is violent, it is whether he or she is "disruptive, distracting or unruly. . . ." *Rachel H.*, 14 F.3d at 1401.

If M.L. would be " 'so disruptive in a regular classroom that the education of other students is significantly impaired, [his] needs . . . cannot be met in that environment. Therefore regular placement would not be appropriate to

his . . . needs.'" 34 C.F.R. § 300.552 Cmt. (quoting 34 C.F.R. Part 104, App. A). *See also* 34 C.F.R. Pt. 104, App. A (interpreting 34 C.F.R. § 104.34) (same). If a student continuously exhibits aggressive and distracting behaviors such as tantrums or physical aggression, a school district may reasonably conclude that the student would have a detrimental effect on the regular classroom. *See Seattle Sch. Dist., No. 1 v. B.S.*, 82 F.3d 1493, 1497 (9th Cir. 1996) (holding that it was appropriate to place a child who "exhibited frequent behavioral problems, including physical and verbal aggression, oppositionality, tantrums, attention difficulties, and the showing of inappropriate affection toward adults" in a special education program); *Clyde K.*, 35 F.3d at 1402 ("While school officials have a statutory duty to ensure that disabled students receive an appropriate education, they are not required to sit on their hands when a disabled student's behavioral problems prevent both him and those around him from learning.").

In addition to biting, kicking and bruising others, M.L. has a history of whining, crying, and throwing tantrums. The record contains evidence that M.L. "scored greater than the 98th percentile for disruptive behaviors." Lai Doo, M.L.'s in-home therapist, testified that M.L.'s "level of aggression seem[ed] to be a lot more severe than the others that [she had] seen." Dr. Schwartz concurred that M.L. would likely distract or threaten the safety of other students. The overwhelming evidence in the record supports the district court's conclusion that M.L.'s parents' "characterization of M.L.'s behavior as a mere distraction is disingenuous," and that "even if M.L.'s aggressive and disruptive behavior will be directed solely towards his instructors and caretakers . . . M.L.'s disruptive presence in the classroom would likely impair the education of the

normally developing children." Therefore, the third *Rachel H.* factor weighs against placing M.L. in a regular education classroom. A balance of the three relevant *Rachel H.* factors supports the conclusion that the Federal Way School District did not violate the IDEA's mainstreaming requirement by placing M.L. in a self-contained classroom.

VII.

M.L.'s parents assert that the Federal Way School District's "failure to take action to prevent continued teasing of a disabled child" denied M.L. a FAPE. M.L.'s parents argue that there is uncontradicted evidence in the record that the Federal Way School District was deliberately indifferent to C.D.'s reports that her child was being teased. They maintain that the teasing resulted in a denial of a FAPE. Neither the statute nor any court has directly addressed the question whether unremedied teasing can constitute a denial of a FAPE. *Cf. Charlie F. ex rel. Neil F. v. Bd. of Educ. of Skokie Sch. Dist. 68,* 98 F.3d 989, 990, 993 (7th Cir. 1996) (remanding action brought by parents under, *inter alia,* § 1983 to the district court for failure to exhaust the IDEA's administrative remedies and concluding that when a teacher "repeatedly invited her pupils to express their complaints about [the student] . . . [which led] to humiliation, fistfights, mistrust, loss of confidence and self-esteem, and disruption of [his] educational progress" "that at least in principle relief is available under the IDEA").

Under the IDEA, a disabled child is guaranteed a FAPE, 20 U.S.C. § 1412(1), which "'provide[s] *educational benefit* to the handicapped child.'" *Gregory K.,* 811 F.2d at 1314 (quoting *Rowley,* 458 U.S. at 201) (emphasis added).

If a teacher is deliberately indifferent to teasing of a disabled child and the teasing is so severe that the child can derive no benefit from the services that he or she is offered by the school district, the child has been denied a FAPE. *Cf. Davis ex rel. LaShonda D. v. Monroe County Bd. of Educ.*, 526 U.S. 629, 633 (1999) (holding that to violate Title IX "harassment . . . [must be] so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit").

The record shows that by removing M.L. from Mark Twain Elementary School after only five days, M.L.'s parents failed to give the Federal Way School District a reasonable opportunity to find a way to end the teasing of M.L. M.L.'s parents have also failed to demonstrate that teasing resulted in the loss of an educational benefit. M.L.'s parents have offered no evidence that the teasing affected M.L. or interfered with his education. As noted above, C.D. testified that during one of the teasing incidents M.L. was "happy as a little lark." C.D. also stated that during another episode "because he had his headphones on most of the time he was being teased . . . [she] didn't know if he even heard it."

M.L.'s parents contend, without evidentiary support, that unpunished teasing "can easily escalate from mere verbal abuse, to physical or sexual abuse" and is "potentially dangerous." M.L.'s parents also argue that teasing poses a particular danger to M.L. since, because he has little or no verbal skills, he would be unable to report any physical abuse. However, M.L.'s parents have not directed this court's attention to any violence, or threat of physical contact, between a student and M.L. M.L.'s parents have not adduced sufficient evidence to show that M.L. was

denied a FAPE by the Federal Way School District's alleged failure to stop the teasing.

CONCLUSION

We hold that the Federal Way School District's failure to include a regular education teacher on the IEP team when there was a possibility that M.L. might be included in a regular education classroom was a procedural violation of the IDEA. However, since the violation did not result in a loss of an educational opportunity for M.L., the Federal Way School District's failure to include a regular education teacher on the IEP team did not violate the IDEA.

We also hold that by articulating the academic expectation that kindergarten students will learn to read, the Federal Way School District did not determine M.L.'s placement based on a rigid policy or criteria.

The record shows there would be little to no benefit to placing M.L. in a regular education classroom. In contrast, the program offered in the self-contained classroom would offer him substantial benefits in all developmental areas. After balancing the three relevant *Rachel H.* factors, we conclude that the Federal Way School District did not violate the IDEA's mainstreaming requirement by placing M.L. in a self-contained classroom.

Finally, we conclude that if a teacher is deliberately indifferent to teasing of a disabled child and the teasing is so severe that the child can derive no benefit from the services offered by the school district, the child has been denied a FAPE. However, the record in this case does not support the conclusion that either the teacher or the

Federal Way School District were deliberately indifferent to any teasing or that teasing denied M.L. an educational opportunity.

The district court's decision granting the Federal Way School District's motion for summary judgment is AFFIRMED.

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

M.L., a minor, and C.D. and S.L., his parents, Petitioners, v. FEDERAL WAY SCHOOL DISTRICT and WASHINGTON SUPERINTENDENT OF PUBLIC INSTRUCTION, Respondents.	CASE NO. C01-899C ORDER (Filed Apr. 3, 2002)

This matter comes before the Court on Respondent Washington Superintendent of Public Instruction's Motion for Summary Judgment (Dkt. No. 27); Respondent Federal Way School District's Motion for Summary Judgment (Dkt. No. 32); and Petitioners' Motion for Partial Summary Judgment (Dkt. No. 30). Having considered the submissions of all parties, the Court rules as follows.

BACKGROUND

This dispute involves the provision of special education services at the Federal Way School District (the "District") in the state of Washington. Petitioner M.L. and his parents seek review of an administrative decision regarding M.L.'s individualized educational plan ("IEP") developed by the District.

ANALYSIS

I. Respondent Washington Superintendent of Public Instruction's Motion for Summary Judgment

The Washington Superintendent of Public Instruction ("SPI") argues that there is no indication that the District is out of compliance with federal and state requirements. As required by the Individuals with Disabilities Education Act ("IDEA"), SPI provided an administrative due process hearing to review the District's treatment of M.L. pursuant to 20 U.S.C. § 1415(f). According to SPI, it owes no further duty to M.L. or his parents.

Petitioners seek damages and attorney fees from SPI for the failure of both the District and SPI to ensure M.L. a free and appropriate education ("FAPE") as required by the IDEA. 20 U.S.C. § 1412(a). Petitioners argue that SPI must do more than simply monitoring the District for compliance. Instead, as a state educational agency, SPI has an independent obligation to ensure that M.L. receives a FAPE. If a state educational agency fails to meet any of the twenty-two conditions set forth in section 1412(a) of the IDEA, the state becomes ineligible for federal assistance. 20 U.S.C. § 1412. The Ninth Circuit ruled in *Doe by Gonzales v. Maher*, 793 F.2d 1470 (9th Cir. 1986), that a state educational agency will be held liable for a local district's inaction. Petitioners argue that the state educational agency is itself ultimately responsible for ensuring that each individual child receives a FAPE and that SPI may not evade that responsibility by claiming that its role is merely supervisory.

In their repeated insistence that SPI owes M.L. the duty to provide a FAPE, Petitioners have failed to address

the question of what that duty legally requires. A state educational agency is only required to act in response to a local district's noncompliance if (1) the district's breach of duty is significant, (2) the child's parents give state officials adequate notice of the local agency's noncompliance, and (3) the state agency is afforded a reasonable opportunity to compel the district's compliance. *Gonzales*, 793 F.2d at 1492. SPI argues, and the Court agrees, that Petitioners' demand for a due process hearing may not serve as notice of a significant breach by the District because such a rule would assume that the request for a hearing carries with it substantive proof of noncompliance. If this were true, convening a hearing and arriving at a decision would be pointless.

The Court finds that Petitioners' claim for damages and attorney fees against SPI is premature. Petitioners freely chose to make use of SPI's administrative hearing process instead of filing a citizen complaint, which would have triggered an investigation into the District's compliance. Petitioners' disagreement with the hearing officer's findings and conclusions is insufficient at this stage to raise a genuine issue of material fact with respect to SPI's compliance with the requirements of the IDEA. Petitioners may not prevail against SPI without first demonstrating that the hearing officer's decision was in error *and* allowing SPI a reasonable opportunity to amend the consequences of that error. Therefore, Respondent SPI's motion for summary judgment must be GRANTED.

II. Respondent Federal Way School District's Motion for Summary Judgment and Petitioners' Motion for Partial Summary Judgment

Because the District's motion for summary judgment and Petitioners' motion for partial summary judgment came ripe simultaneously and address identical issues, they will be considered together.

Jurisdiction in this matter is conferred by the IDEA itself 20 U.S.C. § 1415(i)(2)(A). In this context, summary judgment is a vehicle for asking the Court to decide the case based on the administrative record. *Heather S. v. Wisconsin*, 125 F.3d 1045, 1052 (7th Cir. 1997). Unlike most summary judgment situations, disputed issues of material fact are not an obstacle. Instead, Petitioners must show by a preponderance of the evidence that the administrative law judge made the wrong decision.[1] Petitioners' challenge to the administrative law judge's decision revolves around the following issues: whether the District complied with the IDEA's procedural requirements in formulating M.L.'s IEP, and whether the IEP developed through those procedures was reasonably calculated to enable M.L. to receive a free and appropriate public education. *Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206-07 (1982).

The Court notes that few issues of disputed fact exist, and Petitioners have declined to introduce any new evidence

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[1] "In any action brought under this paragraph, the court – (i) shall receive the records of the administrative proceedings; (ii) shall hear additional evidence at the request of a party; and (iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(B). *See Heather S.*, 125 F.3d at 1052.

for review. Therefore, this order will focus on the legal questions introduced by the parties and identified above. Petitioners argue that the District violated both the procedural and the substantive requirements of the IDEA in formulating M.L.'s IEP. Procedurally, Petitioners argue that the District violated the IDEA by not including a regular education teacher of M.L. on the IEP "team." Substantively, Petitioners argue that (1) the District impermissibly relied on M.L.'s inability to learn to read, (2) the District failed to "mainstream" M.L. to the maximum extent possible, and (3) the District failed to remedy instances of teasing directed at M.L. by his regular kindergarten classmates.

A. Procedural Violations

The team of evaluators participating in the development of M.L.'s IEP included two school administrators, a special education teacher, a psychologist, an occupational therapist, a speech therapist, and a school principal. Pet'r. Mot. Summ. J. at 27. Petitioners argue that the makeup of this team violated the IDEA's specific requirements and that the procedural violation led to substantive violations of the Act.

Petitioners are correct in their assertion that the IDEA requires the participation of "at least one regular education teacher of [the] child (if the child is, or may be, participating in the regular education environment)." 20 U.S.C. 1414(d)(1)(B)(ii). However, as the District points out, M.L. was not participating in regular education classes at the time the IEP meeting took place. Instead, M.L.'s mother had removed him from the regular kindergarten classroom in which he was initially placed after only five days of

school. M.L.'s previous regular education teacher was a preschool teacher in another school district. In the case of a student who is new to the district, it is permissible to include only teachers who are likely to be entrusted with him in the new placement. *Clyde K. v. Puyallup Sch. Dist.*, 35 F.3d 1396, 1400 (9th Cir. 1994).[2]

Even if the Court were to find that the District's failure to include a regular education teacher of M.L.'s on the IEP team amounted to a procedural violation of the IDEA, such a violation would not necessarily constitute the denial of a FAPE. *W.G. v. Target Range Sch. Dist.*, 960 F.2d 1479, 1484 (9th Cir. 1992). Only "procedural inadequacies that result in the loss of educational opportunity . . . or seriously infringe the parents' opportunity to participate in the IEP formulation process . . . clearly result in the denial of a FAPE." *W.G.*, 960 F.2d at 1484. Minor procedural deficiencies do not require that an IEP be set aside. *Amanda J. v. Clark Cty. Sch. Dist.*, 267 F.3d 877, 892 (9th Cir. 2001). Therefore, the question whether the alleged procedural violation amounted to the denial of a FAPE depends on whether or not M.L. suffered a substantive loss of educational opportunity.

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[2] Petitioners attempt to distinguish *Clyde K.* by pointing out that in that case, the student was already enrolled at a "self-contained" program at the time of his IEP meeting. *Id.* at 1400. However, the two cases are hardly distinguishable. Like Clyde K., M.L. was enrolled at a new school at the time of his IEP meeting, M.L. had been removed from the regular education environment prior to the meeting, and M.L. was not attending classes in his new placement at the time of the meeting.

B. Substantive Violations

Petitioners allege three sets of substantive violations of the IDEA: (1) the District impermissibly relied on M.L.'s inability to learn to read in recommending a non-integrated placement, (2) the District failed to "mainstream" M.L. to the maximum extent possible, and (3) the District failed to remedy instances of teasing directed at M.L. by his regular kindergarten classmates.

Only the first of these alleged violations involves a significant factual dispute between the parties. According to Petitioners, the District relied on M.L.'s likely inability to learn to read in kindergarten when it recommended that he be excluded from regular classes. However, the text of the deposition offered in support of this conclusion falls short on its face. The deponent merely stated that the "District's expectation is that reading is for all students." Pet'r. Mot. Partial Summ. J. at 31. She never asserted that any student would be barred from enrolling in kindergarten based on a perceived difficulty with the academic curriculum. Rather, "[a]nyone who is of . . . kindergarten age . . . can be enrolled." Resp. to Pet'r. Mot. Partial Summ. J. at 11. The Court declines to find that the District refused to enroll M.L. in a regular kindergarten classroom in violation of 20 U.S.C. § 1414(b)(2)(B). To the contrary, the District made a regular kindergarten placement available to M.L. upon his arrival in the District and held it available after M.L. was withdrawn from school by his mother.

Petitioners also complain that the District failed to "mainstream" M.L. 20 U.S.C. § 1412(a)(5)(A). The IDEA requires that "[t]o the maximum extent appropriate, children with disabilities, including children in public . . .

institutions, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." In this circuit, a special education placement must be evaluated to determine "(1) whether [the student] was receiving academic and non-academic benefits in the regular classroom; (2) whether [his] presence was a detriment to others in the classroom; and (3) whether the District demonstrated that the cost of placing [him] in a regular classroom would be significantly more expensive." *Sacramento City Unified School Dist. v. Rachel H.*, 14 F.3d 1398, 1402 (9th Cir. 1994).

With regard to the first prong of the *Rachel H.* test, it is clear that M.L. could hope to gain little academic benefit from a placement in a regular kindergarten classroom focused on developing reading skills. As the District points out, M.L. is almost completely nonverbal. He has virtually no communication skills, and at the time of his evaluation he was not yet toilet trained. His cognitive ability places him at the first percentile level on the Battelle Developmental Inventory. Petitioners object that M.L. made significant progress in his previous regular preschool placement. However, they ignore the simple fact that a kindergarten classroom geared toward teaching children reading skills is a very different environment from preschool. The Fifth Circuit has noted that "mainstreaming would be pointless if we forced instructors to modify the regular education curriculum to the extent that the handicapped child is not required to learn any of the skills

normally taught in regular education. The child would be receiving special education instruction in the regular education classroom; the only advantage to such an arrangement would be that the child is sitting next to a nonhandicapped student." *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1049 (5th Cir. 1989). Students with prohibitively severe handicaps need not be mainstreamed. *Id.* at 1046.

The District argues that M.L. requires special education to get the support he needs to increase and generalize his skills. The Ninth Circuit has addressed the importance of early intervention in cases of autism and approved the very program upon which M.L.'s IEP was based. *Adams v. State of Oregon*, 195 F.3d 1141, 1146 (9th Cir. 1999). The District's experts at the due process hearing uniformly identified the special education placement at Wildwood Elementary as the superior option, and Petitioners offered no expert testimony in rebuttal.

The second part of the first prong of the Ninth Circuit test focuses on nonacademic benefit to the disabled child. The administrative law judge found that in a regular education environment M.L. would interact primarily with his one-on-one aide as opposed to his peers. Petitioner argues that M.L. might benefit from modeling the language and behavior of the non-handicapped children in a regular classroom. However, as the District points out, M.L. lacks the independent skills necessary even to socialize with other children in an integrated classroom setting. The District also plausibly suggests that the presence of M.L.'s one-on-one aide in the integrated classroom – the only person in the room with whom M.L. would be able to interact – would actually serve to isolate M.L. rather than increasing his independence. The Wildwood

special education placement, on the other hand, offers the best of both worlds: it teaches children with M.L.'s challenges to function without the constant presence of an adult, and it also offers mainstreaming opportunities throughout the week that provide opportunities for socialization with non-handicapped children. The expert testimony in this case is unanimous that Wildwood is the least restrictive option for M.L.

Most importantly, the opportunity for interaction with normally developing students, standing alone, is insufficient grounds for mainstreaming. *Daniel R.R.*, 874 F.2d at 1051. As the District's expert puts it, "being there simply isn't enough." Resp. to Pet'r Mot. Partial Summ. J. at 26. The Court finds no significant non-academic benefit to M.L. from a regular classroom placement.

The second *Rachel H.* prong focuses not on the benefits of the regular placement for M.L., but on the effect of his presence in the regular classroom on the teacher and the other children in the class. The administrative law judge found that M.L. exhibits extremely disruptive behavior and must be monitored constantly by a one-on-one aide. Petitioners protest that a child who simply requires extra teacher attention is not sufficiently disruptive to impair the education of other children. *See Sacramento City Unified Sch. Dist. v. Holland*, 786 F.Supp. 874, 879 (E.D.C.A. 1992). However, "[i]f other children are disadvantaged by the presence of the handicapped child, mainstreaming is not appropriate." *Id.* (citing *David R.R.*, 874 F.2d at 1049). Petitioners' characterization of M.L.'s behavior as a mere distraction is disingenuous. M.L. has been known to bite, kick, and bruise his caretakers. Resp. Pet'r Mot. Partial Summ. J. at 27. The testimony indicates that on at least one occasion, M.L. has exhibited aggression

toward other children. *Id.* M.L. also has a history of whining, crying, and throwing tantrums. Resp. Pet'r Mot. Partial Summ. J. at 28. Even if Petitioners are correct in assuring the Court that M.L.'s aggressive and disruptive behavior will be directed solely towards his instructors and caretakers, Pet'r Mot. Partial Summ. J. at 41, the Court must nevertheless find that M.L.'s disruptive presence in the classroom would likely impair the education of the normally developing children. Because the parties seem to agree that the cost of mainstreaming M.L. is not significantly different from the cost of the Wildwood special education placement, this concludes in developing the Court's inquiry into the *Rachel H.* factors. On balance, the Court cannot find that the District failed to mainstream M.L. to the maximum extent possible in developing his IEP.

Petitioners' final contention is that the District failed to provide M.L. with a free appropriate public education in violation of the IDEA by failing to remedy the teasing he allegedly suffered during his five days in the regular kindergarten placement. Petitioners claim that M.L.'s mother daily witnessed other children in M.L.'s kindergarten class teasing him and that despite numerous appeals to M.L.'s teacher, no steps were taken to remedy the teasing until she was forced to remove him from school.[3] Even assuming that Petitioners' version of the alleged teasing incidents is correct, they have entirely failed to supply any legal authority for the proposition that such teasing amounts to a denial of a FAPE. The cases cited by Petitioners stretch credibility and are wholly inapposite.

[3] The District claims that M.L.'s teacher only learned of the teasing during the last day that M.L. was at school.

For example, in *Charlie F. v. Skokie Sch. Dist.*, 98 F.3d 989 (7th Cir. 1996), the teacher in the disabled student's classroom encouraged other pupils in her class to vent their frustrations and complaints about the disabled child in his presence, causing "humiliation" and "fistfights." *Id.* at 990. In *Murrell v. Sch. Dist. No. 1*, 186 F.3d 1238 (10th Cir. 1999), the disabled student was *sexually assaulted* by her fellow student. *Id.* at 1242.

When the school learned of the multiple assaults, its reaction was to ask the student not to inform her mother that the assaults had taken place. *Id.* at 1243-44. Finally, in *Sch. Board of Prince William Cty. v. Malone*, 762 F.2d 1210 (4th Cir. 1985), the disabled student was pressured by non-disabled students into participating in drug transactions. *Id.* at 1212. None of these incidents can legitimately be described as "teasing." The Court declines to consider Petitioners' claim that the District's alleged teasing incidents constituted a denial of a FAPE.

For all of the above reasons, the Court finds that the District did not significantly deviate from the IDEA's required procedures in formulating M.L.'s IEP and that the IEP developed through those procedures was reasonably calculated to provide M.L. with a free and appropriate education. The Court also finds that the District's alleged failure to remedy incidents of teasing in the regular kindergarten classroom did not amount to a denial of a free and appropriate education. Therefore, Petitioners' Motion for Partial Summary Judgment is DENIED. Respondent Federal Way School District's Motion for Summary Judgment is GRANTED.

CONCLUSION

Respondent Washington Superintendent of Public Instruction's Motion for Summary Judgment is GRANTED. Petitioners' Motion for Partial Summary Judgment is DENIED. Respondent Federal Way School District's Motion for Summary Judgment is GRANTED. The clerk is directed to enter judgment for Defendants.

SO ORDERED this 30 day of April, 2002.

/s/ John C. Coughenour
CHIEF UNITED STATES
DISTRICT JUDGE

APPENDIX E

STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS FOR THE SUPERINTENDENT OF PUBLIC INSTRUCTION

IN THE MATTER OF: FEDERAL WAY SCHOOL DISTRICT	SPECIAL EDUCATION CAUSE NO. 2000-SE-130 and 2001-SE-003 **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

A hearing in the above-entitled matter was held before Administrative Law judge Mattie Harvin Woode in Federal Way and Seattle, Washington, on February 1, 2, 5, 6, 7, 8, 9, and 12, 2001. The interested parents, C.D. and S.L. ("Parents") were represented by John McClean, attorney at law. The Federal Way School District ("District") was represented by James Dionne, attorney at law. The Student whose education is at issue did not participate in the hearing. The Administrative Law Judge, having sworn the witnesses, heard testimony, and considered the admitted exhibits and arguments of the parties, hereby enters the following:

STATEMENT OF THE CASE

The District initiated these proceedings, with a request for due process hearing received by the Office of Superintendent of Public Instruction on November 13, 2000, regarding the appropriateness of its evaluation. This appeal was assigned OAH docket number 2000-SE-0130. On November 16, 2000, the parties were mailed a Notice of prehearing conference and Notice of Hearing. A pre-hearing conference was held on November 28, 2000. The Parents

requested that the conference be continued so that the Parents could obtain legal representation. A second pre-hearing conference was held on December 21, 2000, and a pre-hearing order was issued on December 27, 2000.

On January 4, 2001, the Parents filed a request for due process hearing with the Office of Superintendent of Public Instruction. This appeal was assigned OAH docket number 2001-SE-003. A pre-hearing conference was held on January 17, 2001, pursuant to notice mailed to the parties on January 8, 2001. Upon agreement of parties, both docket numbers were consolidated by order issued on January 24, 2001. On January 25, 2001, the undersigned issued an Order denying the Parent's request to translate all trial exhibits into Vietnamese. On January 29, 2001, a pre-hearing conference was held pursuant to a request by a request by Parent's attorney. By order dated January 29, 2001, the undersigned continued the due process hearing date to begin on February 1, 2001.

A due process hearing was held on February 1, 2, 5, 6, 7, 8, 9, and 12, 2001. The parties agreed to extend the 45-day due date for the issuance of a decision until 30 days after the close of record, March 5, 2001, to permit the parties to submit post-hearing briefs and proposed Findings of Fact and Conclusions of Law. The parties later agreed to extend the date for submission of briefs and proposed Findings and Conclusions until March 12, 2001. The District submitted its proposed Findings and Conclusions on March 12, 2001. The Parents submitted their Post-Hearing Brief on March 12, 2001. Subsequently, on March 22, 2001, the Parents requested the opportunity to submit proposed Findings and Conclusions. The District had no objection to the Parents submitting proposed findings and conclusions. However, after the undersigned

extended the 45-day date to accommodate the Parents' subsequent submissions, the District, through correspondence, indicated that it objected to any extension of the 45-day date. The Parents then filed a request to extend the 45-day date in order that they have an opportunity to submit proposed findings and conclusions. The undersigned found good cause to permit such an extension of the 45-day due date. The Parents were given until April 11, 2001, to submit their proposed Findings and Conclusions, which they submitted on April 11, 2001. Accordingly, the record closed on April 11, 2001, and the 45-day date extended until April 25, 2001.

ISSUES

a. Whether the District has appropriately implemented the last agreed upon individualized education program (IEP) executed in the Tukwila School District on January 31, 2000.

b. Whether the District's evaluation of the Student is appropriate and, in the alternative, whether the parents are entitled to an independent educational evaluation at public expense.

c. Whether the District was obligated to translate all of the Student's records, including records from outside providers, into the native language of one of the parents, when English is the native language of the other parent.

d. Whether the District's translation of the Evaluation Report, Evaluation Addendum and IEP was adequate.

e. Whether the IEP formulation process denied the Parents an opportunity to meaningfully participate in the Student's education.

f. Whether the District has developed an appropriate IEP and placement for the Student, pursuant to the IDEA and state implementing statutes and regulations for the 2000-2001 school year.

g. Whether the District should be ordered to provide compensatory education in the form of occupational therapy including sensory integration therapy, physical therapy, ABA therapy, private music lessons, private sports lessons, private tutor and computer equipment.

EVIDENTIARY RULINGS

Parent's exhibits 238, 236, 250, 257, 270, and 267 (two videotapes) are admitted. District's exhibits 165 and 170 are admitted. Unless specifically excluded, all other exhibits are admitted.

FINDINGS OF FACT

The Student's Background

1 The Student was born on November 13, 1994, and is a resident of the District. He has a diagnosis of autism, mental retardation and macrocephaly. He is globally delayed across all developmental domains consistent with his cognitive level.

2. The Student is nonverbal and has few communication skills. At six years of age he is not toilet trained and wears diapers. He attends primarily to playing of a favorite song, videotape, or Mother's singing of his favorite song. Mother uses a Walkman cassette player with his favorite music to obtain compliance when she takes the Student into the community. She uses his favorite video as a reward for behavioral training at home.

3. The Student's father was born in Vietnam and Vietnamese is his native language. He speaks very little English. The Student's mother was born in the United States and her native language is English. She does not speak Vietnamese. The Mother is primarily involved in the Student's education, and does not work outside the home. Father works full-time 6:30 a.m. to approximately 2:30 p.m., Monday through Friday.

Tukwila School District 1997 through 2000

4. The Student began preschool in the Tukwila School District during the 1997-1998 school year. He attended preschool four-days-per-week for approximately two hours per school day for three years. Except for a few months in his third year, during the 1999-2000 school year, the Student was continuously assigned to Jodie Wickes' integrated preschool classroom. The class followed the same routine each day, using the same songs and activities. Each year, the class also included several of the same students and the same instructional assistants. His class usually contained approximately 12 typically developing students and four or five children with special needs. During one year, four of the students were autistic.

5. During his first year, the Student did not interact much with other children. Although he had days when he seemed happy, there were many days of whining and crying. During his second year, he began to notice the other children and interact with them. Deanna Bailey is the occupational therapist that worked with the Student during the three years he was in Tukwila school district. Based on her testimony, the Student enjoyed being with

his peers, was responsive to them and exhibited some eye contact and hugging with them.

6. The Student participated, to a limited extent, in the classroom activities. He had a 1:1 instructional assistant who remained with him throughout the day. Most of the time, he attended to part of the circle time activity if the instructional assistant sat directly behind him and helped him participate.

Aggressive Behaviors

7. Throughout the course of his three years of attendance in Tukwila, the Student periodically displayed aggressive behavior. However, during the second year of school, his level of aggression escalated, especially when he was frustrated or given more challenging tasks. He would cry and whine or bite and scratch the instructional assistant. He mouthed many objects and even children. Ms. Wickes used headphones and music as a calming strategy for the Student.

8. The Student's aggression has been documented by many of his service providers. Lai Doo, the Student's in-home ABA therapist, went to his school on three to six occasions to observe the Student when his aggression was at its worse. Even though she observed him to be a fairly social autistic child and not aggressive toward other children, she also saw that his level of aggression (when asked to perform a task) was more severe than other autistic child she had worked with. While the Student could identify numbers, letters, colors and shapes during his in-home ABA sessions, his aggression got in the way of his performance of tasks. Beginning in June 2000, his aggressive behavior during his in-home therapy sessions

increased. When frustrated because he could not have one of his favorite toys, he would lunge at anyone present. However, she noted that as the Student's level of communication increased, his level of aggression decreased.

9. Ms. Doo ended her sessions with the Student in August 2000, when she left to go to school. She resumed in-home therapy with the Student in January 2001. The Student continued to display aggressive behaviors such as crying, biting, pinching, scratching, pulling, grabbing and throwing fits when frustrated. Although the Student seemed more patient in his attempts to communicate his wants to an adult, he still expressed his frustration with violent behavior when asked to do a difficult or unpleasant task or when a favorite activity (e.g., watching television) was ended.

10. The Student's occupational therapy progress reports from Puget Sound Therapy Services documents that as of August 2000, the Student's behavior was interfering with his performance in therapy. The Student had frequent temper tantrums and displayed aggressive behavior such as hitting and pinching. Based upon the recommendations of the occupational therapist, the Student would do better in a more structured environment.

Tukwila IEP

11. The Student's last IEP from Tukwila is dated January 31, 2000, with an end date of September 22, 2000. The IEP has a built-in transition plan for the Student from preschool to kindergarten. Under the IEP the Student received 130 minutes four times per week of integrated preschool, 30 minutes two times per week of speech therapy, 30 minutes two times per week of occupational/

physical therapy and special education transportation. The IEP also provided that the Student be monitored at all times by a staff member. This required the Tukwila School District to add a full-time instructional assistant, which did not necessarily have to be the same person throughout the day.

12. The Student also received variable amounts of 1:1 services from private occupational and language therapists. These private services were fully paid for by Medicaid funding for all amounts not covered by private health insurance.

13. At home, the Student received an additional twelve hours of 1:1 services, delivered in a drill format, using applied behavioral analysis ("ABA") techniques with Lai Doo. The decision to provide behavioral services in the family home was made when the Student was four years old. At that time, he was too young to participate in an extended day program and his disruptive behaviors escalated during the time these services were provided. The Tukwila IEP provided that the effectiveness of this therapy would be reviewed in April 2000, and if the Student was not benefiting from the therapy, it would be reduced.

14. While in the Tukwila School District, the Student was assigned to a different teacher at the beginning of his third school year. The Student was transferred to this teacher's class because she had experience with autistic children and wanted to work with the Student. The Student's former teacher, Jodie Wickes, believed that the change would be good for the Student. This teacher's preschool class was similar to Ms. Wickes' preschool class.

15. The Student's mother was displeased with the new teacher because she believed that the teacher was rude to her and did not want her to be actively involved in the Student's education. Mother had a variety of complaints regarding the teacher and the classroom, particularly the fact that the teacher did not accept Mother's input. After a heated conversation between Mother and the teacher regarding the teacher's interaction with Father and her mother-in-law, Mother removed the Student from school until the Tukwila School District agreed to reassign the Student to Jodie Wickes' class for the remainder of his third year of school.

16. While he was in the Tukwila district, the Student made great gains through physical therapy. He learned to independently ride a tricycle up and down a 130-foot hallway and maneuver it through an obstacle course, jump on a trampoline, walk on a balance beam and sit upright while riding in a scooter board pulled by the other children.

17. After the Student was reassigned to Ms. Wickes' class, the Tukwila School District modified his IEP on January 31, 2000. The new IEP added a planned transition to kindergarten in September 2000. The IEP team intended to facilitate this transition to kindergarten by having the Student's instructional assistant move with him to the kindergarten class. Under the IEP the Student was to receive the same services plus 120 minutes five times per week of integrated kindergarten. The IEP team decided to place the Student in the integrated kindergarten class at Tukwila Elementary School because it had more intense special education services available than did the Student's home school at Thorndyke Elementary School, the school where Mother wanted him placed.

Although some IEP team members recommended the self-contained placement at the Tukwila School rather than the integrated kindergarten class, the final compromise decision was to assign the Student to the integrated kindergarten with a regular education certificated teacher, but to use instructional assistants to deliver a full day of special education for the Student within that classroom. Because a regular education certificated teacher cannot design, monitor, evaluate or supervise special education services, the self-contained special education teacher was assigned those duties, although she was not going to directly teach the Student in her classroom.

18. This kindergarten transition plan was never implemented at Tukwila School District because the Student's family moved to the Federal Way School District on or around July 30, 2000. During the summer months, Lai Doo, the Student's home ABA I therapist, provided services through August 21, 2000. All of these services were billed to and paid by the Tukwila School District.

Transfer to Federal Way School District

19. On July 19, 2000, the Student's mother enrolled the Student in the District. She met with Chuck Nykreim, the coordinator for elementary special education. He copied numerous records that the Student's mother brought with her. He also requested that she fill out Release of Confidential Information forms so that the District could obtain information about the Student. The ten release forms covered records from Tukwila School District as well as various providers including occupational therapists, speech and language therapists, physical therapists, physician, mental health counselor and case manager and

ABA therapist. Mother did not fill out release forms for all of the Student's providers. Although Mother testified that she was told by Mr. Nykreim to only fill out releases for current providers, the undersigned does not find this credible, especially since the releases Mother filled out included former providers as well as current providers.

20. Mother returned the release forms to the District on August 1, 2000. She also filled out a Special Education Referral form which was also returned to the District on August 1, 2000. When asked on the form whether sign language was needed, Mother wrote, "yes, for child." When asked if any other language interpreter was needed, Mother checked the box that said "no."[1] She did, however, indicate that the primary language spoken in the home was English and the secondary language was Vietnamese.

21. On August 24, 2000, the Student's file was assigned to Jan Rutledge, a school psychologist. The District decided to implement the Tukwila IEP which was due to expire on September 30, 2000. Ms. Rutledge sent a Notification of School District Action to the Parents on August 28, 2000, indicating that the Student had transferred into the District from the Tukwila District with a current IEP dated January 31, 2001, and that he would be placed in an integrated kindergarten, pursuant to his current IEP, and reevaluated.

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[1] Mother testified that she thought that she was indicating that the Student did not need a language interpreter. However, the evidence supports the District's reliance and interpretation of the written statement which appears to indicate that the child needed sign language (Mother specifically wrote "for child") but that no one else needed language interpretation.

22. The Student's last complete evaluation by Tukwila School District is dated August 18, 1997. The Tukwila District began the process of reevaluating the Student but the evaluation was never completed and is not dated. Therefore, Ms. Rutledge decided that the Student should be reevaluated. Ms. Rutledge's opinion was based upon information she received from Northwest Center, private assessments and the Student's current IEP.

The District's implementation of the Tukwila IEP.

23. The District attempted to implement the Student's Tukwila IEP. The Student was placed at Mark Twain elementary school in an integrated kindergarten. Mother requested Mark Twain because it was the closest elementary school that had an integrated kindergarten. The District made arrangements for the Student to receive the same level of related and supplementary services that he had received in Tukwila. The District was unable to locate an ABA therapist to provide in-home services. Mother agreed that she would initiate finding the home therapist, similar to the agreement she made with Tukwila School District. Mother is on the Board of Directors of the Washington State Autism Society, was a member of, and had connections with FEAT (Families for Effective Autism Treatment), and had many other friends and contacts that assisted her in finding providers in the home. Sarah Drinkwater, the Director of Student Support Services, provided Mother about eight pages of names of potential therapists. Mother interviewed two persons from this list and then asked them to contact Dr. Drinkwater. One of these two persons never contacted Dr. Drinkwater. Dr. Drinkwater asked the other person to confirm having

business insurance for contracting with the District and she never called Dr. Drinkwater back.

The Student's Placement at Mark Twain

24. The District decided to place the Student with Sandy Ramsey, a teacher who is dually certificated in regular education and special education and who had experience teaching both preschool students and kindergarten students.

25. Mother asked Ms. Ramsey to meet before the start of school to introduce Ms. Ramsey to the Student and to discuss his needs. They mutually scheduled this meeting for the morning of August 31, 2000, the Parent Orientation day. Ms. Ramsey followed this verbal agreement with a formal written Notice of an IEP team meeting which Mother received on August 26, 2000. Ms. Ramsey wanted to ensure that an IEP was prepared by the beginning of the school year. After Mother received this Notice, she called Ms. Ramsey and specifically requested that they not hold an IEP meeting because she only asked for a informal meeting.

26. Mother and the Student attended the scheduled Parent Orientation day event and met with Ms. Ramsey afterwards. Cara Newlun, an occupational therapist with the District, and Pat Worden, the full-time instructional assistant in Ms. Ramsey's class, also met the Student during that meeting. Ms. Worden also has worked with other autistic children.

27. On September 5, 2000, the first day the Student attended class, Ms. Newlun went into Ms. Ramsey's class to observe the Student. She observed both the Student and

his mother for about an hour while they were sitting on the floor in the classroom. Ms. Newlun later shared her observations with Sue Folker, the occupational therapist that evaluated the Student as part of the multidisciplinary team. The Student's assigned speech and language pathologist also came into the classroom to meet with the Student on the sixth day of school. However, he was not there because Mother had removed him from school.

28. During the few days he attended class, Ms. Ramsey controlled the Student's behavior by letting him listen to his favorite music on his headphones, provided by Mother. Mother as well as Jodie Wickes used this strategy to calm the Student and control his behavior.

29. The District also hired an instructional assistant specifically for the Student for the first day he attended Mark Twain School. However, he ran so fast around the playground that this employee quit after one day because she could not keep up with him. The District assigned another instructional assistant to the classroom on the second day of the Student's attendance but she too quit after working one day with him. The District had a substitute in the classroom every day the Student attended school except for the third day of his enrollment when, because of insufficient notice from one of the assistants who quit, no additional instructional assistant was available other than Pat Worden, the full-time instructional assistant and the other half-time instructional assistant. Mother agreed to stay with her child for that day. She also stayed with the Student on other days when instructional assistants were there.

30. During the first week of school, the District interviewed applicants for a replacement for the instructional

assistants who quit. Mother was provided the opportunity to participate in those interviews. The District offered the job to one of these applicants who then later rejected that offer. All of these events took place within the few days that the Student was enrolled at Mark Twain School.

31. The Student only attended classes for five days from September 5, 2000, through September 11, 2000. At that point Mother removed him from school even though she had originally agreed with the Mark Twain placement and the manner in which the District implemented the Tukwila IEP. Mother removed the Student solely for the fact that she became displeased with the teacher, Sandra Ramsey.

32. Mother had called Diane Niksich-Conn, the Vice-Principal of Mark Twain, on September 12, 2000, and reported a teasing incident that allegedly occurred the day before. Although Mother had left a message with Ms. Ramsey on September 12, 2000, she also contacted the Vice-Principal. Ms. Niksich-Conn suggested that Mother contact Ms. Ramsey. Ms. Niksich-Conn then contacted Ms. Ramsey and advised her to talk to Mother.

33. The next day, Ms. Ramsey called Mother to discuss the September 11 incident along with other matters. During that conversation, Ms. Ramsey asked Mother to give Ms. Ramsey the first opportunity to take care of problems before Mother took the matter further. Mother was displeased with Ms. Ramsey's response and abruptly ended the conversation. She removed her child from school. Mother did not speak with any District administrator about her displeasure, prior to removing the Student. After she removed the Student, Mother told Dr. Drinkwater that she was withdrawing the child because she did not

like the teacher and did not feel that the teacher was dealing with the teasing appropriately.[2] Mother never mentioned any displeasure about the program or placement and did not give the District notice that she was removing the Student from school. With the assistance of Dr. Drinkwater, Mother picked up his belongings from Mark Twain a few days later.

34. On or around September 17, 2000, the District offered to place the Student at Wildwood Elementary School in a self-contained classroom taught by Teresa Thomas, a special education-endorsed teacher with experience in teaching autistic children. However, after speaking to Ms. Thomas on September 18, 2000, Mother did not want to enroll the Student there because she did not believe the program to have enough inclusion.

Mother's Prior Removals of Student

35. Mother has a pattern of removing the Student whenever she believes that a provider or teacher is "rude" to her. Mother removed the Student from the Highline Developmental Preschool in which she enrolled the Student before his third birthday because she thought the Highline teacher was rude to her.

36. Mother also withdrew the Student from the classroom of another teacher named Sandy during his third year at Tukwila School District because [she] believed that Sandy was rude to her mother-in-law and Father. Mother even temporarily removed the Student from Jodie Wickes'

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[2] In her testimony Mother identified four incidents of teasing that occurred within the first week which occurred outside during recess and not in Ms. Ramsey's class.

classroom three times but each time she eventually returned him to the classroom.

37. Student was involved in a summer school program during the summer of 2000. This was part of the Student's extended year services provided under his Tukwila IEP. Mother removed the Student from the program in July because she was having problems with the teacher whom she felt was rude and insulted her. She unilaterally withdrew the Student even though Tukwila School District paid for the program.

The District's Evaluation

38. Even though Mother had removed the Student from school, the District followed through with its obligation to evaluate the Student. The District received the Parents' Consent to Evaluate form on August 24, 2000. The District initiated a reevaluation of the Student on August 28, 2000. Soon after, Jan Rutledge, the school psychologist, attempted to schedule an evaluation of the Student. However, she met with resistance from Mother who questioned why another evaluation was needed. Even after she removed him from school, Mother continued to resist making the Student available for an evaluation because she wanted to first secure a placement. Mother was also concerned with the way the evaluation would be done. After a series of telephone calls from Jan Rutledge, Mother finally agreed to make the Student available for an evaluation.

39. On October 6, 2000, the multidisciplinary team ("MDT") met to evaluate the Student. The MDT comprised of Jan Rutledge, school psychologist; Carola Smail, SLP; Sue Folker, certified occupational therapist; and Mother.

40. The evaluators were knowledgeable and experienced in the area of autism and mental retardation. Jan Rutledge has evaluated and worked with autistic children for many years. Each year, for the past twenty years, she has performed two to four evaluations on autistic children. Sue Folker is board certified in occupational therapy and has worked with autistic children in educational and clinical settings. Carola Smail has worked as a speech and language pathologist in the District for nine years. During that period of time she has attended several continuing education courses focusing on the education of autistic children. Dr. Drinkwater has completed course work and continuing education in autism and has experience teaching autistic children. Each of the evaluators were properly certificated and qualified to conduct the evaluation under state and federal law.

41. The evaluation was conducted based upon the evaluators' review of extensive records from providers Mother had identified, the Tukwila IEP, Mothers interview and their own two-hour observation of the Student. In addition, prior to the evaluation, Ms. Rutledge spoke to the school psychologist at the Tukwila School District and Jodi Wicks, the Student's preschool teacher at Tukwila. Based upon the credible testimony of District witnesses, the MDT had sufficient information to make a determination regarding eligibility and recommendations to the IEP team.[3]

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[3] Mother claims that she told the members of the MDT at the meeting that there were additional records from outside providers that they did not have. However, I do not find this credible. Mother's statement was credibly refuted by Jan Rutledge, who testified that Mother never mentioned having additional information.

42. During the District's evaluation, the evaluators used several methods to assess the Student. They asked Mother for suggestions and used her familiarity to gain the Student's cooperation. Because of his roaming behaviors, they followed the child's lead rather than attempting to make him conform to adult directives. They attempted to use favored toys and headphones with music to reward demonstration of skill levels and to obtain compliance; they reduced distractions by using a quiet, empty and sparsely decorated room; they used nonverbal modeling and demonstration techniques to attempt to prompt.

43. Throughout most of the evaluation, Student was not compliant with most of the assessment tasks and was more engaged in what he wanted to do. For instance, whenever his headset was removed he engaged in whining and crying until it was given back or unless Mother sang the song on the tape. He would remain calm until the headset was removed. At times he became frustrated and tried to bite at an evaluator when he did not want to attend to a task. During the evaluation, the Student displayed behavior typical of an autistic child such as roaming around the room in a pattern.

44. Based on the report from Northwest Behavioral Associates, the Student displayed similar behavior during his weekly sessions there. The evaluator, Wendy Knowles, noted that the Student has a tendency to escape or avoid tasks by whining, crying or throwing himself on the floor. Attempts to restrain him would increase his inappropriate behavior. The Student's behavior was ignored until he chose to comply with the task. After a period of two months of therapy there, his behavior during his sessions at NWBA improved.

45. As part of the District's evaluation, Jan Rutledge assessed the Student's cognitive skill, personal-social skills and adaptive skills using the Battelle Developmental Inventory with Mother providing information along with Ms. Rutledge's observation of the Student. Based on the cognitive assessment, the Student has significant cognitive delays in all subdomains including perceptual discrimination, memory, reasoning and academic skills, and conceptual development. The program recommendations by the MDT were matching simple geometric forms; increasing auditory and visual attention, responding to auditory stimuli, attending to adult direction, consistently responding to "one" and "one more"; identifying familiar objects by their use given verbal cues, gestures or signs and identifying "big" and "small" shapes.

46. Based on the personal-social assessment, the Student has significant delays in all subdomains including adult interaction, expression of feelings, self-concept, peer interaction, coping and social role. The MDT recommended the following goals for the Student: increasing eye contact (specifically when given adult directives or cues), continuing to vocalize when imitated, initiating appropriate social contact with peers and imitating peers at play, increasing his response to his name and increasing direction following related to his daily routine.

47. Based on the adaptive assessment, the Student has delays in all subdomains including attention, eating, dressing, personal responsibility, and toileting. The MDT recommended the following goals for the Student: independent self-feeding with a spoon or fork, putting on simple articles of clothing, increasing on-task behavior, using the toilet when placed on it on schedule and consistently responding to cues regarding his personal safety.

48. The Student's language skills were evaluated by the District's speech and language pathologist, Carola Smail. The Student's communication skills were evaluated using informal measures, parent interview, and observation. Based upon Ms. Smail's evaluation, the Student is nonverbal and his communication skills were severely delayed, consistent with children with autism. The Student communicates by bringing an adult to a desired item, bringing a desired item to an adult, facial expressions, several functional signs, sounds and a few words. The evaluators also noted that during the evaluation, the Student said, "hi" to children as they were walking past him on their way to recess. He also attempted to sing his favorite song.

49. Lauren Lindsay is a licensed speech and language pathologist who evaluated the Student on February 29, 2000, and March 2, 2000. Ms. Lindsay's evaluation confirms that the Student has severe levels of impairment in terms of his expressive communication, speech, and expressive and receptive language performance.

50. The MDT made three recommendations in the area of communication: direct speech/language therapy to increase his ability to understand and predict daily activities (using a picture schedule, small class size and specially designed instruction); increase expressive communication skills (by increasing number of signs, pictures and/or verbal words); and an augmentative technology consultation once the Student was returned to school. The MDT also recommended the use of "total communication" techniques with the Student, including signing, a picture exchange communication system (PECS), and other verbal and visual systems.

51. The Student's fine and gross motor skills were assessed by Sue Folker, an occupational therapist with the District. The Student's fine motor skills could not be formally assessed because he did not engage in presented tasks as requested. However, the team observed the Student engage in gross and fine motor tasks throughout the time he roamed around the room. For example, on several occasions, he opened the door and stepped into the hallway. In addition to the information provided by Mother, Ms. Folker also reviewed and considered information from a fine motor assessment on September 2, 1999, by Pam Rauch at Swedish Medical Center. This was the most current standardized test with age equivalents. Based on the expert testimony of Dr. Yvonne Swinth, it was appropriate to use this information, even though it was one year old, because it provided the evaluators with a longitudinal picture of the Student's skill level.

52. The Student's fine motor skills are consistent with those associated with autism. For example, he uses a pronated grasp when holding a writing instrument, rather than a tripod grasp. His fine motor skills, which are on the lower end, would limit his full participation in an integrated kindergarten classroom setting that requires extensive paper and pencil tasks. Therefore, the MDT recommended direct and consultative occupational therapy.

53. Ms. Folker also assessed the Student's gross motor skills. Along with her personal observations and Mother's information, she reviewed an assessment by Carrie Emmons at Apple Therapy Center on April 21, 2000. Ms. Folker also had the classroom observation information from both the Tukwila School District IEP and from Cara Newlun, the occupational therapist who observed the

Student with his mother in the room during the first week of school at Mark Twain, and who met with Ms. Folker at lunch to discuss that observation.

54. Based on Ms. Folker's assessment, the Student's gross motor skills are delayed but his strength and flexibility appear normal for his age. Carrie Emmons, the physical therapist that evaluated the Student at Apple Therapy on April 21, 2000, indicated that the Student's balance was poor. However, during the MDT evaluation, the Student was able to walk across a ten foot balance beam three to four times with minimal assistance from his mother. The MDT also noted that the Student had mastered goals and objectives from his Tukwila IEP (i.e. riding a tricycle ten feet, ascending and descending seven stairs while alternating feet, and taking off socks). Based on physical and occupational therapy evaluations in April 2000, the Student can also catch a large ball from two feet, walk tiptoe in a swimming pool, walk with a heel-toe gait, run with his heels off the ground, walk over uneven ground with good balance, and jump on a trampoline. Therefore, based upon the totality of evidence, the Student has adequate functional mobility and balance to move within the school environment including recess activities. Therefore, he does not need physical therapy.

55. Although Ms. Emmons, the physical therapist from Apple, recommended additional physical therapy, three times a week for a period of four weeks, this was only for the purpose of working on five specific goals: standing on one foot for 15 seconds when asked; walking on his toes 10 feet when asked; walking backwards 10 feet when asked; hopping on one foot three times without losing his balance when asked; skipping 15 feet when asked; and catching and tossing a medium sized ball four times when asked.

However, the evidence establishes that none of these skills are necessary within an educational environment.

56. The MDT's conclusions about the Student's gross motor skills were also confirmed by the expert testimony of Dr. Swinth and a recent Midway Physical Therapy evaluation that the Parents obtained on January 2, 2001, subsequent to the District's evaluation. The Midway evaluation found that the Student's range of motion, strength, and walking, are all within normal limits, that he enjoys running, and his movement patterns are "smooth and coordinated." It was also noted that he had no difficulty sifting and standing.

57. The MDT evaluated the Student's sensory needs. The Student enjoys music, especially one particular song. When music is incorporated into activities, he often becomes interested in the activity. The Student also has decreased awareness of his body in space. The MDT made recommendations for inclusion of a "sensory diet" to be imbedded within his daily classroom program to increase his sensory processing skills and address the Student's frustration whenever he needed to be calmed or organized so that he could learn.

58. Hearing evaluations included review of an earlier audiogram at Group Health in 1997 that determined that his hearing was within normal limits. Another hearing exam in April 1999 by Autism/ADD Resources also confirmed that the Student's hearing was not defective. The Parents' own testing by Evergreen Speech and Hearing Clinic, on November 22, 2000, after the District's reevaluation, confirms that the Student's hearing is within normal limits.

59. The Student's vision was not an area suspected of being a disability. The Student does not wear glasses and his vision is within normal limits.

60. The MDT concluded that the Student is eligible for special education under the funding category Developmentally Delayed, Three to Six Years/Autism. The team recommended placement in a special education program which is specifically tailored to his needs, offers a small class size, provides visual supports, and provides predictable and consistent schedule and routines. They also recommended related services for speech/language therapy and occupational therapy/consultation.

61. The appropriateness of the evaluators' testing, strategies, conclusions and recommendations were confirmed by the testimony of Dr. Ilene Schwartz, a professor and autism expert at the University of Washington and Dr. Yvonne Swinth, a professor at the University of Puget Sound, School of Occupational Therapy. Both of these experts reviewed the District's evaluation, reports from outside providers, and viewed videotape of the Student. I find their testimony credible.

62. The reports and evaluations that the MDT considered, included information that indicated that the Student could perform certain skills that he would not exhibit during the evaluation. Due to the Student's level of autism and mental retardation, this would not be unusual. Like many autistic children, the Student has not learned to generalize many skills. Therefore, disparities in reports from outside providers, confirm the emerging nature of the Student's skills. The testimony of Dr. Schwartz helped clarify this explanation. There are four levels of learning: acquisition, fluency, maintenance and generalization. The

Student does not demonstrate the generalized stage of learning. Therefore, a report of the Student's skills will only reflect the context in which it was measured. For example, the Student will have more favorable reports from a familiar service provider than an unfamiliar provider. However, he will be unable to demonstrate those skills when asked to do so in another environment. Therefore, reports that may describe variable demonstrations of skills are not contradictory; they merely confirm that his skills are emerging and not generalized.

63. Based on Dr. Schwartz's opinion, generalization is an area that specifically needs to be addressed with autistic children. For the most part, the Student has been taught in de-contextualized learning environments such as the 1:1 in-home ABA therapy and clinical settings and pull-out services. Instead of relying so heavily on these services, Dr. Schwartz recommends the use of a more naturalistic learning environment where the skill is taught in context. For example a more naturalistic learning activity would be where a teacher prompts a child to gesture by pointing to a cup when thirsty and then providing the child with a cup of water as the natural reinforcer for making the communicative request rather than an extrinsic reward (e.g. a cracker) which makes no such natural connection.

MDT Meeting

64. The multidisciplinary team met on October 13, 2000, to discuss the results of the evaluation. In attendance was Jan Rutledge, Carola SMAIL, Sue Folker, Dr. Drinkwater, Mother and Sara Avrams, Parents' lay advocate, and the Student.

65. Ms. Avrams testified to her observations during the evaluation meeting and the Mother's subsequent attempted enrollment of the Student at Star Lake Elementary. However, I do not find most of her testimony credible. I particularly find not credible, her recall of minute details of statements by District witnesses, without, according to her testimony, having reviewed her notes in three months. Moreover, Ms. Avrams made it clear that she is the Parents' advocate and it is her responsibility to advocate on behalf of the Parents' desires, even if she does not agree with them. Therefore, the undersigned gives her testimony little weight.

66. On October 17, 2000, the District sent the Parents the Evaluation Report (written in English). The District also provided the Parents with a copy of their rights and procedural safeguards (in English). Mother read and understood the documents. Parents later submitted their objections to the District on October 27, 2000. Parents objected to the scope of the evaluation and the use of records that they believed to be outdated.

67. The District translated the Evaluation report and Mothers written objection to the Evaluation report into Vietnamese. This was mailed to the Parents on November 9, 2000. The actual translation of the documents was done by Quy Nguyen, a Vietnamese interpreter who is employed by the District as a paraeducator and as an interpreter in its English as a Second Language program. He is also employed as an interpreter with Puget Sound Educational Services Department, a translation service.

68. Father has difficulty understanding the Vietnamese translated documents because there were many technical terms and phrases in the documents that he did not

understand such as "large motor movement", as used in Carrie Emmons physical therapy report, and the letters "SLP" (which stands for speech language pathologist).

69. On October 27, 2000, Parents requested that the District provide an independent evaluation. On November 9, 2000, the District filed a request for a due process hearing in response to the Parents' request for an independent evaluation.

Evaluation Addendum

70. On October 26, 2000, subsequent to the evaluation, the District received additional information from Northwest Behavioral Associates ("NWBA"), one of the Student's private providers. This assessment was done in August 2000. The information included a Vineland Adaptive Behavior Scales and Assessment of Basic Language and Learning Skills, two very extensive assessments. Much of the information gained through this assessment was from Mother's report to the evaluator. This information corroborated the emerging level of the Student's developmental skills and his severely limited adaptive behavior levels. The Student's low scores in adaptive behavior confirmed Dr. Lovell's earlier diagnosis of mental retardation.[4] The Student scored *greater than* the 98th percentile for disruptive behaviors which indicates that he has significant behavioral problems and significant delays in socialization skills. The Student's social skills score, which was derived from a questionnaire completed by Mother, was extremely

[4] NWBA's evaluation was supported by the diagnosis of mental retardation in the medical records from Group Health in 1997 and in the psychiatric evaluation by Dr. Lovell at Valley Center in 1999.

low, indicating that the Student has significant delays in socialization.

71. MDT considered and incorporated this information into the Evaluation Report via an Addendum dated November 17, 2000. This addendum was sent to the Parents on November 22, 2000, along with a copy of procedural safeguards in English. Even though the Evaluation Addendum was not complete in time for the IEP meeting, Ms. Rutledge made the information available to the IEP team at its November 13, 2000 meeting.

72. The District later translated the Evaluation Report Addendum into Vietnamese and sent it to the Parents on November 29, 2000. Dr. Drinkwater obtained a copy of the translated notice of procedural safeguards from the website of the Superintendent of Public Instruction and mailed it to the Parents along with the translated Addendum on November 29, 2000, or the translated IEP on December 12, 2000. Although Parents deny having received the translated procedural safeguards, I find Dr. Drinkwater's testimony credible.

73. On November 22, 2000, Mother made a written request that the District translate all of the Student's educational records, including reports and evaluations from independent medical service providers and other third party providers. Mother also requested that the District translate these documents by November 24, 2000. This was the Parents' first written request for documents. Mother had made a verbal request earlier and the District obliged by providing translated versions of the Evaluation Report, Addendum and Mother's objections.

Attempted Enrollment at Student's Home School

74. On October 25, 2000, a little over a week after the MDT meeting, Mother attempted to unilaterally enroll the Student in the regular education program at Star Lake Elementary School, the Student's home school. In a faxed letter, Mother informed the school personnel that she expected the school to take the appropriate steps to serve the Student. On October 30, 2000, Mother and her advocate, Sara Avrams went to the school to enroll the Student. However, they both expected such enrollment to be refused since they knew it was not his assigned placement. Ms. Avrams admitted that she suggested that Mother enroll the Student just to force the District to identify a placement. The Student was not allowed to enroll and Mother, Ms. Avrams, and the principal had a telephone conference Dr. Drinkwater. During that telephone conference, Dr. Drinkwater informed Mother that she could not enroll the Student at Star Lake, as that school was unable to provide the Student with an appropriate special education program. She again offered Wildwood Elementary, as well as several other schools, as an alternative placement pending completion of a new IEP. The District never withdrew the Mark Twain assignment, and it always continued as an option for the Students assigned placement. Mother refused all of the offers including Wildwood.

Scheduling of November 13, 2000 IEP Meeting

75. Dr. Lee Saffrey is a program specialist in the District that provides support to elementary schools including, Wildwood Elementary. On November 1, 2000, Dr. Saffrey mailed the Parents a letter indicating that the District was proposing an IEP meeting for November 13, 2000, at 8 a.m. Enclosed with the letter was a copy of Procedural Due

Process Rights, Notice of an IEP meeting and a copy of the Student's Evaluation Summary, all in English. The Notice specifically stated that the meeting would be held at Wildwood Elementary School. Dr. Saffrey also faxed the Notice of IEP meeting to the Parents on November 1, 2000.

76. Mother faxed Dr. Saffrey a letter on the afternoon of November 1, 2000, indicating that she would not attend any IEP meetings unless the staff from Star Lake Elementary, the Student's home school, were present, and only if the meetings were held at the administration offices or Star Lake. Mother indicated that she would be available on November 13th but not until after 6 p.m., due to the Fathers work schedule. She requested a Vietnamese interpreter for the Father. Mother also instructed the District to only contact her by mail and in writing.

77. On November 2, 2000, Dr. Saffrey wrote Mother a second letter indicating that staff from Star Lake would not be invited because there was not an appropriate program available at that site. The District refused to change the IEP meeting time to 6 p.m. but agreed to change the meeting time to 4 p.m. The District also changed the location of the meeting to its administrative offices and agreed to provide an interpreter. Dr. Saffrey also outlined the list of District personnel that would attend the meeting.

78. On November 6, 2000, the District received a faxed letter from Mother indicating that the Parents would not be available to meet at 4 p.m. The times Mother proposed were:

Anytime after 6 p.m., Tuesday through Friday
Anytime after 7 p.m. on Monday
Between 4:15 a.m. and 5:15 a.m., Monday through Friday Between 7 a.m. and 10 a.m. or after 4 p.m. on Saturdays
Between 7 a.m. and 9 p.m. on Sundays

Mother also indicated that she did not want any of the staff from Wildwood to attend the meeting and reiterated the Parent's desire that the Student attend his home school. Again, Mother asked the District to respond in writing by fax or mail. Mother faxed this letter at 3:13 p.m.[5] Mother faxed an identical letter bearing Father's signature at 3:25 p.m.

79. On November 9, 2000, Dr. Saffrey faxed Parents another letter indicating that the District would be flexible to meet with the Parents anytime during the hours of 7 a.m. to 4-6 p.m., Monday through Friday.[6] She also offered the Parents an opportunity to participate through a conference call.

80. On November 10, 2000, Mother faxed a letter to Dr. Saffrey indicating that the Parents would not be able to attend the November 13 IEP meeting and questioned whether the District could hold such a meeting without the Parents. Mother also questioned how a conference call could be set up, given the number of participants.

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[5] Mother testified that her fax machine was one hour **ahead** because she did not reset it after Daylight Savings time ended. The administrative law judge takes judicial notice of the fact that Daylight Savings time ended on October 29, 2000.

[6] The District's practice is to start an IEP meeting no later than 4 p.m. because, according to their contract, District staff cannot be required to attend meetings beyond their normal workday.

Although she indicated that Parents would be willing to participate in a telephone conference, she also indicated that the Father could not participate in a conference call while at work and that they could not participate in a conference call at anytime on November 13, 2000. Again, Mother required that the District contact her by mail or facsimile and in writing.

81. On Monday, November 13, 2000, the day of the IEP meeting, Dr. Saffrey faxed Mother another letter informing Mother that it would not be difficult to set up a conference call with multiple participants. She asked Mother to indicate her dates and times that she would be available for a telephone conference call. This fax was received by the Parents at 3:29 p.m.

82. In reply to Dr. Saffrey's letter, Mother faxed another letter on November 13, 2000, at 3:45 p.m. indicating that she received Dr. Saffrey's fax "a few minutes ago." Mother indicated that the Parents are only able to attend an IEP meeting, whether in person or via conference call, during the times she gave in her previous correspondence. Again, Mother requested the District to only communicate to her in writing. Neither Parent attended the IEP meeting.

83. Much of Mother's testimony, regarding her attendance at the IEP meeting, was inconsistent and I do not find her testimony credible. Mother testified that she did not attend the IEP meeting on November 13, 2000, because the Student had an afternoon appointment at NWBA and she did not want him to miss the appointment.[7] Mother further claims that she faxed the letter at

[7] The only reason the Student and his in-home ABA therapist went to NWBA once per week was so that the in-home ABA therapist could

(Continued on following page)

3:45 p.m. just before she left home to take the Student to his appointment. However, the evidence establishes that Mother was at home at the time of the IEP meeting. An eight-page letter from Mother, dated October 4, 2000, was faxed to the District on November 13, 2000, at 5:05 p.m. (Parents' fax machine log indicates 6:05 p.m.) Mother testified that she herself did not fax the pages to the District, but that she asked her mother-in-law",[8] the one who does not speak English, to fax the letter to the District. However, Exhibit 124 shows a fax cover sheet from Mother, written in Mother's handwriting wherein she dated the document November 13, 2000, and wrote the time as 5:05 p.m. It would be inconceivable that Mother would write 5:05 p.m. on the fax cover sheet when she left the home at 3:45 p.m. as she claims. It would be further incredulous that her mother-in-law would be able to fax the document at the exact time Mother wrote on the fax cover sheet. There is further evidence that Mother was home at the time of the IEP meeting. The Parents' fax journal was also printed at 5:10 p.m. (Parent's journal says 6:10 p.m.) but Mother testified that she did not return home that evening until 7:30 p.m. Based on the foregoing, I do not find Mother's testimony credible.

84. Mother testified that she would not agree to having the IEP meeting at 8 a.m. (the original time set by the District) because she could not arrange childcare.

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be trained and receive assistance with lesson plans. However, the Student did not have an in-home ABA therapist at the time, and had not had one since Lai Doo left in August. Therefore, there was no compelling need for the Student to go to NWBA at that time.

[8] Mother first testified that she had a friend fax the eight page document

However, in her letter to the District, Mother indicated that she was willing to schedule an IEP meeting at 4:15 a.m. or 5:15 a.m. Mother explained in her testimony that she was willing to send the Father to attend an early morning IEP meeting alone without her. The undersigned does not find this credible given the fact that Mother has been the primary person involved in the Student's education[9] is far more knowledgeable than Father about the Student's condition, his special education needs, and she can speak English.

85. The evidence also establishes that Father was also available for the IEP meeting. Father is a truck driver for a recycling company located in Seattle. It takes Father one-half hour to drive to work in the morning. Fathers time cards, from his place of employment, show that Father clocked out at 2:58 p.m. on Monday, November 13, 2000. Therefore, Father had time to drive home and still attend the IEP meeting.

86. Father is a member of the Teamsters Union. Father did not ask his employer for time off to attend the IEP meeting because he was concerned about losing his job. However, Father has taken time off in the past for medical appointments and Mother has contacted the employer in the past to ask that Father have time off from work. The employer requires ten to fifteen days advance notice.

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[9] During the three years the Student attended Tukwila School District, Father has not attended any IEP meetings concerning his son. The only meeting he has attended concerning his son's education was a mediation, which was scheduled after Mother removed the Student from school.

November 13, 2000 IEP meeting

87. The District developed the Student's IEP at the meeting held on November 13, 2000, at 4:00 p.m. Present was Sarah Drinkwater, Dr. SAFFREY, Thomas Capp (Principal of Wildwood), Teresa Thomas (special education teacher at Wildwood), Jean Lix (speech and language pathologist assigned to Wildwood), Russ Campbell (occupational therapist who serves Wildwood), Linda Gorcester (psychologist at Wildwood) and Quy Nguyen (Vietnamese/English interpreter). The Parents did not attend.

88. The IEP team included persons who had sufficient experience in the area of autism and mental retardation to develop an appropriate educational program. Dr. SAFFREY holds a Ph.D. in education. She taught a self-contained special education class in the District which included children with autism and severe developmental delays. Teresa Thomas is a special education teacher who has taught autistic children. Ross Campbell and Jean Lix have also worked with autistic children.

89. The District mailed the Parents a copy of the IEP on November 17, 2000. Along with the IEP, Dr. Drinkwater enclosed a letter to the Parents offering them the opportunity to further discuss and refine the IEP prepared on November 13, 2000. Parents did not respond. A copy of a translated IEP was mailed to the Parents on December 12, 2000. Quy Nguyen translated the IEP as well.

The District's Proposed IEP
Present Levels of Performance

90. The IEP contains a clear and detailed description of the Student's present levels of performance and discusses the Student's cognitive ability and communication skills.

The IEP team incorporated much of the information from the Evaluation Report as well as the subsequent ABLLS, (Assessment of Basic Language and Learning Skills) done by Northwest Behavioral Associates in August 2000. The IEP provides for an evaluation by the assistive technology team led by Barbaralyn Harden, who is an SLP and assistive technology specialist. Ms. Harden is one of the leading experts in the State of Washington in this field. The assistive technology evaluation would take place once the Student was in class because each particular classroom structure and schedule is different.

91. The present levels of performance include statements of the Student's past performance and behaviors, mainly in clinical settings but also classroom settings. Classroom information was provided to the multidisciplinary team by Cara Newlun, Jodie Wickes May 10, 2000 letter and conversation with Jan Rutledge, the Tukwila IEP and evaluation and Mother's input.

Special Education, Related and Supplemental Services

92. The IEP does not include a behavior plan but provides that a functional behavioral assessment will be completed and a behavior plan, specifying strategies, accommodations and modifications, developed within two weeks after the Student is back in school. The District decided to do the functional behavioral assessment after the Student returned to the classroom so that the behavior plan can be tailored to the classroom.

93. The IEP also provides for an assistive technology evaluation for the Student and a consultation for the Parents so that the Student can work on generalizing his communication skills. In addition to the related services

identified on the IEP the IEP also provides for the classroom teacher, related service personnel, and family to have access to specialists with expertise in autism.

94. Because of the Student's global delays, the IEP provides for an extended school day of 1500 minutes per week, instead of the usual 820 minutes. The IEP provides for the Student to receive 1290 minutes per week of services in a special education classroom; 60 minutes per week of speech and language pathology; 15 minutes per week of occupational therapy; no physical therapy[10]; 75 minutes per week of mainstreaming within the general education kindergarten class; special transportation; adapted physical education; and 60 minutes per week of parent education.

95. The IEP provides the Student with the following supplementary aids and services: augmentative communication and communication strategies consultation for the IEP team and paraprofessional staff; sensory input equipment such as a therapy ball and bean bag, a "busy box" of small hand manipulatives, occupational therapy consultation 30 minutes per week; and a 1:1 educational assistant for 1140 minutes per week. Additional supports include a visit to the University of Washington's Experimental Education Unit by the special education teacher and observation and consultation with specialists knowledgeable about autism.

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[10] The evidence overwhelmingly establishes that the Student has the functional mobility to move about the school environment and does not need physical therapy to benefit from his educational program.

Goals and Objectives

96. The IEP lists 12 measurable annual goals, each with several short-term objectives. The goals and objectives are individualized to the Student's needs and directly relate to his present levels of performance. The goals include criteria by which the achievement of the goals can be measured. The goal and objectives address: compliance behaviors; visual discrimination of shapes and objects and his printed name; completion of a physical or gross motor sequence to increase attention to task; ability to tolerate hand over hand guidance in use of a writing instrument to develop an age appropriate tripod grasp; his ability to understand and predict daily activities and directions by use of a picture schedule; use of a PECS communication board; his understanding of receptive vocabulary by following simple classroom directions; and his expressive communication skills.

Related Services – Speech and Language Pathology

97. The language goals and objectives in the District's proposed IEP address the Student's ability to understand and predict daily activities and directions by use of a picture schedule, Picture Exchange Communication System and communication board. Another goal addresses the Student's understanding of receptive vocabulary by following classroom directions. Another goal is that the Student increase his expressive communication skills. The Student only has emerging skills in this area.

98. The language goals in the District's IEP were developed so that language would be incorporated into the entire school day. This method provides the opportunity for offering more intense language services to the Student

within the natural environment where he can learn, through natural prompts, to associate the use of language with meeting his functional needs. All of the District's expert witnesses agreed that this more naturalistic method is the most effective method for teaching autistic children to acquire and to generalize new language skills, so those skills can more likely become part *of* the child's natural, "adaptive," behavioral repertoire.

Occupational Therapy

99. Based on the testimony of Russ Campbell, in addition to the 15 minutes per week of direct services, occupational therapy is imbedded throughout the Student's classroom program, his lunch period while eating with other children, assemblies and other nonacademic periods. One of the Student's IEP goals will use a gross motor sequence to increase his compliance to task and ability to follow directions. Another goal is to use sensory play material to increase his tolerance for various textures. The third goal is to use hand over hand instruction in use *of a* writing instrument to develop an age appropriate tripod grasp. The IEP provides for Mr. Campbell to meet with the teacher and instructional assistants for 30 minutes per week to consult and define activities for them to do with the Student throughout his daily program. Then Mr. Campbell would work with the Student directly for 15 minutes per week to determine how well the Student is responding to the specific activities and techniques that the teacher and instructional assistants were using.

100. Deanna Bailey is the former occupational therapist who provided occupational therapy to the Student in Tukwila. When he was at Tukwila, she taught the Student

how to ride a modified tricycle and how to walk down stairs using alternating feet. The Student mastered both of these skills. Ms. Bailey testified that 15 minutes per week of occupational therapy would not be sufficient to address the Student's needs. She believes the Student still needs more occupational therapy to help him have good posture and position to sit at a desk, good eye tracking skills and other balance goals to address what she described as hypertonicity, or low muscle tone. However, there is no evidence that the Student's posture interferes with his ability to sit at a desk or that his balance or eye tracking skills inhibits his educational performance.

101. I find the District's testimony, more persuasive than Ms. Bailey's opinion, particularly because most of Ms. Bailey's experience is in a clinical setting rather than an educational setting. The goals of a clinical occupational therapist are different from that of an educational occupational therapist. An educational occupational therapist strives to adopt a program so that a child may participate in an academic setting. Whereas a clinical occupational therapist will work to remediate various skills that a child may not necessarily need at school such as standing on one foot for 15 seconds, or walking on his toes or walking backwards. Although the Student cannot do these skills, they are not necessary for him to receive benefit from his educational program. A preponderance of the evidence, including the testimony of Sue Folker, Russ Campbell, and Dr. Yvonne Swinth, establishes that the District's program provides adequate occupational therapy to meet the Students needs.

Placement self-contained classroom at Wildwood

102. The program that the District recommended for implementing the IEP is the specially-designed, self-contained classroom at Wildwood Elementary School. The District selected a self-contained classroom instead of an integrated kindergarten based upon the Student's level of skills, individual needs and the level of expectations in a kindergarten classroom.

103. The self-contained classroom at Wildwood is modeled on the programming suggestions made by Dr. Geraldine Dawson – an acknowledged autism expert at the University of Washington – for a successful program for autistic children. The program can be individualized to meet the Student's needs, while providing appropriate language and social models for the Student. The program also incorporates specialized strategies for teaching autistic children, including strategies recommended by the TEACCH program, by ABA programs, and by the Experimental Education Unit (EEU) of the University of Washington. The self-contained classroom is taught by a teacher and long-term assistants who have special training in teaching autistic children. It has a staff ratio of 6 adults to 10 students, including the full-time instructional assistant that will be added if the Student attends that program. The class is smaller than an integrated kindergarten and was designed especially for students ranging from kindergarten through sixth grade. Wildwood has a pre-school program for children with autism and would therefore have additional supports and resources available to the Student including two to three autism consultants who have extensive training in teaching autistic children.

104. Jodie Wickes, the Student's preschool teacher in Tukwila School District, testified that the Student should be placed in an integrated kindergarten because it would provide appropriate socialization and communication models. However, even Ms. Wickes admitted that she did not expect the Student to achieve much academic success in a mainstream placement and in her opinion, the only option the Student would have after one year in an integrated kindergarten would be placement in a self-contained classroom for at least part of the day and mainstreamed during non-academic activities.

105. Based upon the testimony of Dr. Schwartz, who reviewed the Student's records, observed him on videotape, and visited and observed the self-contained classroom at Wildwood, the Student does not have the skills to be successful in an integrated kindergarten even though he was successful in his integrated preschool classroom. She explained that at the preschool level, the discrepancy in skills was not as great. However, at the kindergarten level, the Student would be called on to exhibit greater skills. The Student's ability to understand daily activities and follow directions, and his receptive language and expressive communication skills are only at the emerging level. His skills are at such a low level that he would probably not derive educational benefit if placed directly in an integrated kindergarten without developing and generalizing more skills. Moreover, if he was placed in an integrated classroom, the Student's program would be totally different from the other children in the class, wherein he would be working on his program individually with just he and his instructional assistant.

Sensory and auditory integration therapies

106. Based upon the credible testimony of the District's witnesses, sensory integration therapy, auditory integration therapy, and nutritional interventions are not widely accepted in the scientific or educational communities as being effective in the treatment of autistic children and would not be useful in the Student's educational setting. Parents did not provide any expert testimony to rebut the District's evidence that these theories lack general acceptance in the educational community.

Weight of the Evidence

107. In reaching the above findings and conclusions below, the ALJ relied heavily upon the District's employees and the testimony of its expert witnesses. Their expertise and experience were well established. To the extent their testimony was in conflict with the testimony of the Parents, Parents' advocate and Parents' experts, the ALJ resolves credibility issues, conflicting testimony and opinions, in favor of the District's witnesses. In doing so, the ALJ weighed and considered all the evidence, including the credibility of the witnesses; their motivations; the extent, nature and quality of their relevant respective specialized training and experience; the reasonableness of the evidence presented; and the totality of the evidence presented.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and subject matter of this action for the Superintendent of Public Instruction as authorized by 20 U.S.C. Section 1401 *et.seq.* (individuals with Disabilities

Education Act (IDEA)), Chapter 28A.155 RCW, Chapter 34.05 RCW, Chapter 34.12 RCW, and the regulations promulgated thereunder, including 34 CFR 300 *et.seq.*, and Chapter 392-172 WAC.

2. The Individuals with Disabilities Education Act (IDEA) (formerly the Education for All Handicapped Children Act) and its implementing regulations provide federal money to assist state and local agencies in educating children with disabilities, and condition such funding upon a state's compliance with extensive goals and procedures. In *Hendrick Hudson District Board of Education vs.* Rowley, 458 U.S. 176, 102 S. Ct. 3034 (1982), the Supreme Court established both a procedural and a substantive test to evaluate a state's compliance with the Act, as follows:

> First, had the state complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the state has complied with the obligations imposed by Congress and the courts can require no more.

103 S. Ct. at 3051.

3. A "free appropriate public education" consists of *both* the procedural and substantive requirements of the IDEA (formerly the EHA). The *Rowley* court articulated the following standard for determining the appropriateness of special education services:

> According to the definitions contained in the (Education for All Handicapped Children Act) a free appropriate public education consists of education instruction specifically designed to meet the unique needs of the handicapped child, supported by such

> services as are necessary to permit the child to benefit from the instruction. Almost as a checklist for adequacy under the Act, the definition also requires that such instruction and services be provided at public expense and under public supervision, meet the State's educational standards, approximate the grade levels used in the state's regular education, and comport with the child's IEP. Thus, if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items of the definitional checklist are satisfied, the child is receiving a 'free appropriate public education' as defined by the Act. 103 S. Ct. at 3041, 3042.

4. An inquiry must first be made into whether a school district has met the "rigorous procedural requirements of the IDEA" and any "State standards that impose a greater duty." *Union School Dist. v. Smith*, 15 F.3d 1519, 1524 (9th Cir. 1994). If a school district cannot demonstrate that it has complied with the procedures in the IDEA and state education laws, the question of whether its proposed program meets the substantive benefit test need not be addressed. *W. G. v. Target Range Sch. Dist. No. 23, Bd. of Trustees*, 960 F.2d 1479, 1485 (9th Cir. 1992).

5. Procedural flaws do not automatically require a finding of a denial of a FAPE. However, procedural inadequacies that result in the loss of educational opportunity, or seriously infringe the parents' opportunity to participate in the IEP formulation process, clearly result in the denial of a FAPE. *Target Range,* id., *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973, 982 (4th Cir. 1990).

6. The district has the burden of establishing by a preponderance of the evidence that it has complied with the

procedural requirements of the Individual with Disabilities Education Act (IDEA), 20 U.S.C. §1401 et. seq., and its implementing regulations, 34 C.F.R. §300 et. seq., and state law. *Clyde K. v. Puyallup School District*, 35 F.3d 1396, 1398 (9th Cir. 1994). This includes the appropriateness of its evaluations, notices, and eligibility determination for the student. See *Seattle School District No. I v. B.S.*, 82 F.3d 1493, 1497 (9th Cir. 1996); *Hacienda La Puente School District v. Honig,* 976 F.2d 487 (9th Cir. 1992).

The District implemented the Tukwila IEP appropriately

7. By the first day of school, the District placed the Student, according to his Tukwila IEP, in an integrated kindergarten with a 1:1 aide with in-class special education instruction and related services. ABA therapy was **not** provided because a provider could not be located. During the five school days that the Student attended classes at Mark Twain, the District attempted to provide the level of services required by his Tukwila IEP. The District also immediately responded, in good faith, to replace those service providers who quit during that first week. While there were some days that the District did not have a 1:1 aide, the evidence overall does not establish that the Student's IEP was not followed.

8. The evidence clearly establishes that Mother did not withdraw the Student from Mark Twain because he was not being served. Instead, the evidence overwhelmingly establishes that Mother withdrew the Student from school solely because of her conflict with the teacher, the same as Mother has similarly done in all of the Student's public

school placements. Therefore, I conclude that the District implemented the Tukwila IEP appropriately.

The District's Evaluation of the Student was timely

9. The IDEA imposes an affirmative obligation on schools to identify, locate and evaluate all children who have, or who are suspected of having, disabilities and needing special education and related services. 20 U.S.C. 1412(a); 34 C.F.R. Sec. 300.125(a) and 300.220(a). See also *Seattle School District No. 1 v. B.S.*, 82 F. 3d 1493 (9th Cir. 1996); *Union School District v. Smith*, 15 F.3d 1519 (9th Cir. 1994).

10. When a student suspected of having a disability is brought to the attention of a district, the district must determine whether or not there is good reason to believe that the student is a candidate for evaluation," and within 25 school days after receipt of the referral, make a determination as to whether or not the student should be evaluated. WAC 392-172-104. A school district must fully evaluate the student and arrive at a decision within 35 school days after consent is obtained from the parent. WAC 392-172-104(2)(a).

11. Here, Mother made a special education referral on August 1, 2000, and on August 28, 2000, which is within 25 school days, the District made a decision to evaluate the Student. The Parents assert that the District did not timely evaluate the Student, whom Mother enrolled on July 19, 2000. Parents assertion is incorrect. The District was required to evaluate the Student within 35 *school* days from the date consent was given. Mother signed consent for the evaluation on August 24, 2000. The thirty-fifth *school* day after parental consent was October 25,

2000. The reevaluation was completed when the evaluation team met with Mother and her advocate on October 13, 2000, and then issued their evaluation report on October 17, 2000. Notice of the reevaluation results was mailed to Mother on October 17, 2000. Therefore, I conclude that the District's evaluation was timely.

The District's Evaluation of the Student is appropriate

12. The IDEA requires educational agencies to "conduct a full and individual initial evaluation . . . before the initial provision of special education and related services." 34 C.F.R. 300.530. *See also* WAC 392-176-108. The purpose of this evaluation is "to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs." 34 CFR 300.500(2). *See also* WAC 392-172-108(2)(a) and (b). The child must be "assessed in all areas related to the suspected disability", 34 CFR 300.532(g), and the evaluation must be "sufficiently comprehensive to identify all of the child's special education and related service needs, whether or not commonly linked to the disability category in which the child has been classified." 34 CFR 300.532(h). The evaluation team should include qualified professionals selected by the District and knowledgeable about the student and the suspected areas of disabilities. WAC 392-172-108(2)(a).

13. The Parents assert that the multidisciplinary team was improperly constituted because there was no autism expert. WAC 392-172-108(2)(a) does not require the multidisciplinary team to be experts in a particular area. Instead, it requires sufficient knowledge of the disability. The District does not have the obligation to bring in

outside experts for an evaluation if it can demonstrate that the team had sufficient experience and knowledge about the Students suspected areas of disability and could rely on expertise from reports and evaluations of outside providers.

14. The members of the multidisciplinary team were knowledgeable about autism, mental retardation and other profound disabilities and had the training and experience to review and understand reports and evaluations from outside providers and appropriately conduct an evaluation of an autistic student. Therefore, I conclude that the District's evaluation team was appropriately constituted.

15. Parents also assert that the Student was not evaluated in all areas of suspected disability. This argument is without merit. The evidence indicates that the Student was in fact evaluated in all areas of suspected disability. Moreover, Parents have failed to elaborate on which areas were omitted by the multidisciplinary team.

16. The team conducting an evaluation must "draw upon information from a variety of sources" and "ensure that information obtained from all these sources is documented and carefully considered." 34 CFR 300.535, WAC 392-172-150. The team must review existing data on the student including evaluations and information provided by the parents; current classroom-based assessment and observations; and observations by teachers and related services providers.

17. Parents assert that the District did not have sufficient information to appropriately evaluate the Student and that it ignored the bulk of data offered by Mother.

However, the evidence does not support this. The multidisciplinary team reviewed and considered all of the information made available to it and there is nothing in the newly acquired records which would render the District's evaluation inappropriate. Moreover, Mother had the opportunity to provide the District with Release Forms for all of the Student's providers and inform the District of any other evaluation or data that had not been considered. She did not do so. Therefore, Mother cannot claim that the District's evaluation lacked information, when she chose to withhold information that she believed important for the District to consider. However, any information that Parents have provided to the District, subsequent to its evaluation, must be considered pursuant to WAC 392-172-150.

18. Parents assert that the District did not have any information from classroom observations and that Mother was only able to give minimal input during the October 6, 2000 evaluation. The evidence does not support this. The District used information from classroom observations which was derived from the written information from the Tukwila School District and conversations with the Tukwila school psychiatrist and Jodie Wickes, the Student's pre-school teacher. In addition, Sue Folker had the classroom observation information from Cara Newlun, the occupational therapist who observed the Student with his mother in the room during the first week of school at Mark Twain. Mother was very involved in the evaluation process. The evaluation report as well as the testimony of members of the multidisciplinary team establish that the team relied on and incorporated Mothers input during the evaluation, especially since the child was noncompliant with many tasks. Moreover, Mother provided significant

input during evaluations conducted by Pam Rauch at Swedish Hospital and Carrie Emmons at Apple Therapy. These are evaluations that the multidisciplinary team relied upon. Therefore, I conclude that the District had sufficient information to appropriately evaluate the Student.

19. Based on the foregoing and in consideration of the Parents' arguments, I conclude that the District's evaluation was appropriate.

An IEP was in place at the beginning of the school year

20. Parents assert that the District violated 34 CFR 300.342(a) which provides "at the beginning of each school year, each public agency shall have an IEP in effect for each child with a disability within its jurisdiction." *See also* WAC 392-72-158. The evidence does not support Parents' assertion. On the first day of school, the Student received services under his Tukwila IEP, which was not due to expire until September 22, 2000. See 34 CFR Part 300 (Appendix A, Question 17) (If child is new to a school district, district can meet the above requirement by adopting the IEP of the former public agency or by developing a new IEP for the child). Therefore, I conclude that the Student had an IEP in place at the beginning of the school year.

The Parents were not denied an opportunity to meaningfully participate in the Student's education.

21. Parents assert that the District denied them the opportunity to participate in the IEP formulation process because of the scheduling of the IEP meeting. The Parents' argument, that the District was obligated to schedule the

time of the IEP meeting to fit both the Mother and the Fathers schedules, is misplaced. WAC 392-172-15700 requires each school district to take steps to ensure that *one or both* parents of a special education student are present at each IEP meeting. See also 34 C.F.R. 300.345(a). To do so, a district must notify the parent(s) early enough to ensure that they will have an opportunity to attend; and schedule the meeting at a mutually agreed upon place and time. However, if neither Parent can attend, a district must use other methods to ensure parental participation including individual or conference telephone calls or video conferencing. 34 C.F.R. 300.345(c) and WAC 392-172-15700(3). A district may hold an IEP meeting without a parent in attendance if the district is unable to convince the parents that they should attend. In that case, the district must have a record of its attempts to arrange a mutually agreed upon time and place, such as records of telephone calls or correspondence between the district and the parents. WAC 392-172-15700(4) and 34 C.F.R. 300.345(d).

22. Parents cite *Urban v. Jefferson County*, 24 IDELR 465 (10th Cir. 1996) as judicial precedent for the proposition that an IEP meeting must be scheduled based upon the Parents' schedule, even if that includes an evening or weekend meeting. The Parents' reliance upon dicta in that decision is misplaced since the court never addressed the issue.[11] The Parents have not cited any authority, and none

[11] While reciting the procedural history of the case, the court discusses the fact that the administrative law judge in the hearing below directed the school district to schedule another IEP meeting to accommodate both parents work schedules. The court did not address the ALJ's ruling in that regard because that portion of the order was not appealed by the school district. Even so, the parents situation in

(Continued on following page)

is known, that supports their argument. The IDEA does not require a district to schedule an IEP meeting only for the convenience of the Parents' or to schedule a meeting to accommodate both parents. It is assumed that the parties will negotiate and attempt to reach a mutually agreeable time and place for conducting the meeting or make other arrangements for parental participation. Comments to 34 C.F.R. 300.345(a) support this conclusion:

> The key factor in §300.345(a) is that public agencies effectively communicate with parents about the upcoming IEP meeting, and attempt to arrange a mutually agreed upon time and place for the meeting. This process should accommodate the parents' work schedules to ensure that one or *both* parents are afforded an opportunity to participate. Emphasis added.

23. In this case, the District attempted to schedule the IEP meeting at a mutually agreed upon time and place. Parents' demand that the District schedule the meeting after 6 p.m. or at 4:15 a.m. was unreasonable. The District's proposed times easily accommodated at least one of the Parents' schedule. Mother was intensely involved in the Student's education from the beginning, and she is the parent most knowledgeable about the Student's condition. Moreover, it would have been unreasonable to require the District to schedule around the Fathers alleged erratic work schedule, especially given the fact that he had not actively participated in the Student's education since his enrollment in the District.

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that case is distinguishable from the present case. Here, only Father had a set work schedule. Mother, who was the parent most involved in the Student's education, was available for the meeting.

24. It was the Parents' own behavior which led to their non-participation. For example, Mother required the District to only communicate with her in writing to schedule the IEP meeting, which delayed the scheduling process. She was not truthful regarding her whereabouts at the time of the IEP meeting and evidence does not support her claim that she was at the child's therapy appointment at the time of the IEP meeting. Rather, the evidence from her own fax machine and handwritten cover sheet indicates that she was at home at the time of the IEP meeting. Moreover, even if the Student had an appointment at NWBA during the time of the IEP meeting, it was not a critical appointment, nor one in which he was to receive services. Mother was fully able to attend the November 13, 2000 IEP meeting at 4:00 p.m., and yet she did not do so. The evidence establishes that Father was off work before 3 p.m. and for some reason, chose not to attend the meeting, despite the fact that he had more than ten days notice to ask his employer for a few hours off to attend the IEP meeting.

25. The Parents' failure to attend an IEP meeting does not in and of itself nullify the IEP if the District has made reasonable and documented efforts to schedule the meeting at a mutually agreed upon time and place. The principle of parent participation does not imply plenary rights. For example, a parent cannot unilaterally "veto" a district-proposed IEP or block its implementation. Similarly, a parent cannot "pocket veto" the development of an IEP by refusing to attend an IEP meeting. The federal regulations at 34 C.F.R. Sec. 300.345 explain that a school district may conduct an IEP meeting without the parent, if unable to convince the parent to attend, following attempts of record to do so.

26. Here, the District made several attempts to schedule the IEP meeting at a mutually agreed upon date and time. The District even offered to have the Parents participate by telephone conference. Both Parents refused to attend the IEP meeting and the District proceeded without the Parents. The District provided the Parents with a subsequent opportunity to review and revise the IEP after the meeting but the Parents never responded. According[ly], I conclude that the Parents were not denied an opportunity to meaningfully participate in the formulation of the Student's IEP because of their own failure to attend the Student's IEP meeting.

Pre-determined Placement

27. An educational agency may not assign placement before an educational program is developed. *Spielberg v. Henrico County Public Schools,* 853 F.2nd 256 (4th Cir. 1988), *cert. denied* 489 US 1016 (1989). Parents assert that the District pre-determined the Student's placement because staff from Wildwood was invited to the IEP meeting. The Parent's argument is without merit. The District notified the Parents, as it was required to do pursuant to WAC 392-172-302, that it intended to implement the Student's IEP at Wildwood. The fact that Wildwood staff was invited to the meeting does not mean that a final decision regarding the Students placement had been made.[12] The evidence establishes that if Parents had attended the IEP meeting, they would have been given an

[12] A school district is required to invite the staff members who are or may be responsible for implementing the IEP. See 34 CFR Part 300 (Appendix A, Question 26).

opportunity to discuss and make recommendations regarding the Student's placement. Accordingly, I conclude that the District did not pre-determine the Student's placement.

The District provided adequate translated documents.

28. Parents assert that the District inadequately translated the Evaluation Report, Evaluation Addendum and IEP which they argue denied Father an opportunity to meaningfully participate in the Student's education. Parents also assert that the District erred because it did not translate all of the Student's educational records into Vietnamese for the Father.

29. 34 C.F.R. 300.345(e) requires that a school district take whatever action is necessary to ensure that the parent understands the proceedings at the IEP meeting, including arranging for an interpreter for parents with deafness or whose native language is other than English. WAC 392-172-15700(5) mirrors the federal regulation. In addition to providing an interpreter, a school district is also required to provide parents with prior notice when the district proposes or refuses to initiate or change the identification, evaluation, educational placement of the student or provision of FAPE to the student. WAC 392-172-302(1). This notice must be written in language understandable by the general public and in the native language of the parent unless it is clearly not feasible to do so. WAC 392-172-306(2)(a)(b). In addition, WAC 392-172-190 requires that a district notify a parent of the results of a reevaluation which must be, pursuant to the requirements of WAC 392-172-302, in the parent's native language.

30. Here, the District provided the Parents with a copy of the Evaluation Report, Mother's objections, Evaluation Addendum and IEP in both English (Mother's native language) and Vietnamese (Father's native language). These documents were translated by an experienced translator. The District also provided an interpreter at the IEP meeting which the Parents did not attend. Other than the Father having difficulty with certain technical words, the Parents have not presented any evidence that would show that the three documents were inadequately translated into Vietnamese. Therefore, I conclude that the District's translation of these documents were sufficient to provide Father a meaningful opportunity to participate in the formulation of the Student's educational program.

The District had no obligation to translate records from all of the Student's outside providers and from his prior school district.

31. Parents have not cited any authority, and none is known, to support their assertion that a school district has the obligation to translate all of the Student's education records (which in this case includes numerous evaluations, reports and letters from third parties and outside providers) into the native language of one parent, when the other parent speaks English and has been the active parent throughout the child's education.[13] Therefore, I conclude

[13] The IDEA does not require a school district to translate all of a child's educational records into another language. It only requires a school district to permit parents to inspect and review their child's education records, respond to reasonable requests for explanations and interpretations (i.e., of raw data or test results) of the information in the records, and provide copies of the records only if the parent has no other way to review and inspect the records. 34 C.F.R. 300.562. See also

(Continued on following page)

that the District was not obligated to translate all of the Student's education records into Vietnamese for Father to meaningfully participate in the formulation of the Student's educational plan.

The District's proposed educational program is designed to confer educational benefit

32. In order to satisfy the IDEA'S requirement of a FAPE, an IEP must be "reasonably calculated to enable the child to receive educational benefit." Citing *Rowley,* 458 U.S. at 207. The substantive test of *Rowley* does not require the absolutely best or potential-maximizing education for the individual child. The states are obliged to provide a basic floor of opportunity through a program individually designed to provide educational benefit to the handicapped child. *B.S.*, 82, F.3d at 1500, quoting from *Union School District v. Smith,* 15 F.3d 1519, 1524 (9th Circuit, 1994). "[T]he basic floor of opportunity provided by the Act consists of access to specialized instruction and related services. . . . *B.S.*, 82 F.3d at 1500; *Rowley,* 458 U.S. at 201. However, a FAPE is provided if the student derives more than minimal or trivial progress in a placement, considering the student's unique characteristics. *Florence County Sch. Dist. Four v. Carter,* 950 F.2d 156, 160 (4th Cir. 1991).

33. The IEP is the cornerstone of the provision of special education services under the IDEA. WAC 392-172-160

Comments to 34 C.F.R. § 300.562 (Copies must be provided if the parent lives outside commuting distance of the school district) (Parents cannot demand copies outside of the above limitation, as districts would otherwise be administratively burdened) (School District is entitled to charge reasonable fees for the actual cost of reproduction and postage).

requires an IEP to contain: a statement of the student's present levels of performance; a statement of measurable annual goals and short-term objectives; a statement of the specific special education, related services, supplementary aids and services and program modifications or supports to be provided, an explanation as to the extent to which the child will participate in the general education environment; a statement of any modifications in the administration of state or district-wide assessments, the proposed initiation date of modifications and services and the expected frequency, location and duration of those modifications and services; a statement of how the student's progress toward the annual goals will be measured; for students age 14 a statement of the transition service needs of the student; aversion interventions, if applicable; and extended school year services.

34. Here, the evidence establishes that the District's proposed IEP is reasonably calculated to enable the child to receive educational benefit. The present levels of performance contain adequate statements of the Student's present levels of performance in all areas of need, as required by 34 C.F.R. §300.346(a)(1) and WAC 392-172-160(1)(a) and specificfy [sic] the nature of his difficulties. The goals and objectives are individualized to meet the Student's particular needs to enable him to transfer to an integrated classroom and his level of special education, related services and placement is appropriate. Accordingly, I conclude that the Student's IEP is appropriate and designed to confer educational benefit.

Parent's Arguments

35. Parents assert that much of the information in the present levels of performance is inaccurate because the District's evaluators did not have sufficient information and Parents were not present at the IEP meeting. The evidence does not support this. While Parents' presence at the IEP meeting could have provided a broader picture of the Student, the District had sufficient information to prepare an appropriate evaluation which became the foundation for the present levels of performance listed in the IEP.[14]

36. Parents further suggest that the present levels of performance are not accurate because the Student has greater skill levels than he exhibited during the evaluation. However, the evidence shows that the Student has not learned to generalize many skills (such as matching shapes and colors) within a variety of environments, even though he displayed them for his Parents, his in-home ABA therapist and long term pre-school teacher. Therefore, I conclude that the District's proposed IEP contains a detailed and accurate summation of the Student's present levels of performance in all domains.

37. Parents also argue that many of the goals and objectives in the IEP are inappropriate and not measurable. The Parents argument is without merit. The goals are directly measurable by the detailed and specific objectives under each goal, which directly relate to the Student's present levels of performance and address his needs in

[14] Mother provided a great deal of information to the District's evaluators as well as the outside providers, whose records the District used in its evaluation.

order for him to be involved in and progress in the general curriculum. See 34 CFR Part 300 (Appendix A Question 1)(annual goal must include either short-term objectives or in the alternative benchmarks to enable those developing and implementing the IEP to gauge progress).

38. Parents also assert that the goals and objective lack specificity such as which colors the Student will be taught to identify and the number of shapes that he will be asked to identify. Specifically, Parents object to use of hand over hand assistance to teach the Student the appropriate tripod grasp of a writing instrument. Parents would prefer other means to be employed to teach him a tripod grasp, such as an assistive technology device. However, Parents' concern regarding for example, specific colors and shapes, is a matter of educational planning best left to the discretion of the educational agency. See *Seattle School District No.1 v. B.S.*, 82 F.3rd 1493 (9th Cir. 1996) (courts must give due weight to judgments of education policy and not substitute its own notions of sound educational policy for that of school authorities). I therefore, conclude that the IEP's goals and objectives are sufficient to meet the requirements of WAC 392-172-159.

39. Parents argue that the IEP inappropriately calls for a functional behavioral assessment and assistive technology evaluation once the Student is back in school. Given the need for these evaluations to take into consideration the Student's behaviors within his classroom environment, I conclude that the District appropriately included within the Students' IEP the need for such evaluations. However, once these evaluations occur, pursuant to WAC 392-172-159(3), the IEP team must consider the results and modify the Student's IEP as appropriate.

40. Parents assert that the IEP does not provide sufficient occupational therapy and physical therapy. The evidence does not establish that the Student is in need of physical therapy to benefit from his educational program. The level of, occupational therapy provided by the District is sufficient. The IEP provides for 15 minutes for direct occupational therapy per week and 30 minutes of occupational therapy consultation with the Student's special education teacher. The testimony of Dr. Swinth and Russ Campbell establishes that the District intended that the Student receive occupational therapy services imbedded throughout his school day. Their testimony also established that in addition to the above imbedded services and the supplementary aids and services listed on the IEP, the District intended that the Student receive an additional 15 minutes per week of direct occupational therapy each week with Mr. Campbell, an occupational therapist. However, the IEP does not clearly state that this 15 minutes of direct occupational therapy will be provided solely by the occupational therapist. The IEP states that the 15 minutes could be provided by the occupational therapist, the special education teacher, classroom assistant and other related service personnel. Therefore, in this regard, the IEP does not match with the District's testimony, and the 15 minutes, as written on the IEP, would be an insufficient amount of services. However, this would not be fatal to the appropriateness of the IEP. The IEP should be corrected to reflect that only an occupational therapist will provide 15 minutes of direct services to the Student each week.

The Student's Placement in the least restrictive environment

41. The Parents contend that the Student can be best served in an integrated kindergarten while the District

proposes to place him in a self-contained classroom. WAC 392-172-180 states that the placement determination shall be based upon: (a) the student's individualized education program; (b) the least restrictive environment requirements of WAC 392-172-172; (c) the placement options that provides a reasonably high probability of assisting the student to attain his or her annual goals; and (d) a consideration of any harmful effect on the student or on the quality of services which he or she needs. Parents assert that the District's proposed placement fails to place the Student in the least restrictive environment.

42. The IDEA requires:

> To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. §1412(a)(5). Federal and state regulations also mandate that a child not be removed from the regular educational environment, if the child's education can be achieved satisfactorily in the regular education classroom with the use of the full range of supplementary aids and services. See 34 C.F.R. 300.550-.553. and WAC 392-172-172.

43. In determining whether the proposed placement is the least restrictive environment, the following factors must be considered: the educational benefits of placement in a general education classroom; the non-academic of

interaction with children who were not disabled; the effect the child's presence has on the class; and the costs of placing the child in the general education classroom. *Sacramento City Unified Sch. Dist v. Rachel H.*, 14 F.3d 1398, 1404 (9th Cir.1994); *Seattle Sch. Dist. No. 1 v. B.S.*, 82 F.3d 1493 (9th Cir. 1996). Here, there is no evidence about associated costs of placing the Student in an integrated classroom. Therefore, only the first three factors will be considered.

1. Educational benefit

44. The evidence establishes that the Student has no expected opportunity for making meaningful academic progress in the heavily academic, regular education kindergarten classroom, where the class is designed to teach students the higher level language skill of learning to read. The Student does not yet have sufficient language foundations to learn academics in that environment. He also lacks certain skills which, according to the testimony of the District witnesses, is fundamental to success in kindergarten. While some autistic children do well in an integrated classroom if they have high skill levels and can attend to directions, the overwhelming evidence establishes that the Student has difficulty attending to directions, has very low skill levels across all domains, and has difficulty making transitions and learning routines. Therefore, the Student's educational opportunities in a self-contained classroom are better than those in a self-contained classroom.

2. Non-academic Benefits

45. Parents assert that the Student should be placed in an integrated kindergarten because an integrated classroom will give him a greater opportunity to socialize with typically developing students as well as develop his own social skills. There is no question that an integrated kindergarten will give the Student some opportunity for socialization and modeling of behavior. However, because of his very low skill levels, the Student's program would be totally different and separate from the children in an integrated classroom. The level of supports that the Student needs will interfere with his ability to make non-academic progress in a regular education environment, even with a trained staff assistant. The Student will be dependent on his assistant, which means he will have less opportunity to interact with peers. His day will be spent interacting with the adult assistant and not his peers. Therefore, placement in a general education classroom may in fact be more restrictive than a self-contained classroom.

46. The evidence establishes that the self-contained classroom at Wildwood will provide the Student with opportunities for socialization and modeling of peers with normal behaviors and communication skills. The Student would have daily opportunities for mainstreaming during music class, library class, physical education, lunch, recess, and other activities. Therefore, the non-academic benefits of socialization and modeling are present within the District's proposed placement.

3. Effect on the Teacher and Children in the Regular Classroom

47. The next factor to consider is whether the Student would have a detrimental effect on others in his general education classroom: will he be disruptive, distracting or unruly and will he take up so much of the teachers time that other students would suffer from lack of attention. Here, the evidence establishes that the Student has extremely disruptive behaviors and must be monitored constantly by a 1:1 aide. His disruptive and aggressive behavior has been documented by teachers, classroom aides, outside providers, his in-home ABA therapist and even Mother. He has a history of biting and bruising his instructional assistants at Tukwila School District and even "mouthing" other children. Until Student is able to increase and generalize his receptive and expressive communication skills, and is able to attend to adult directions, he will continue displaying behaviors such as whining, crying, biting, pulling on others, scratching, laying down on the floor and throwing fits. Although this behavior would be addressed by his 1:1 aide, it would nonetheless be distracting to the teacher and the other students.

48. In considering all of the above factors, I conclude that the appropriate placement for the Student, and the least restrictive environment, would be the self-contained classroom at Wildwood Elementary School and that the District has provided the Student with a free appropriate public education.

REMEDIES

Parents' request for compensatory education

49. If a violation of the IDEA is found in either regard, procedurally or substantively, the court shall grant such relief as [it] deems appropriate. *Hacienda La Puente School v. Honig,* 976 F.2d 487 (9th Cir. 1992). Compensatory education is an equitable remedy which may be appropriate when there is "some rational basis" to believe that procedural inadequacies compromised the student's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of educational benefits. *W G. v. Bd. Of Trustees of Target Range School Dist.*, 960 F. 2d 1479, 1484 (1992).

50. Parents' allegations do not rise to this standard as the District has not denied the Student a FAPE. Parents removed the Student from his placement without notice to the District and has refused to return him to any of the placements offered by the District. Any deprivation of educational benefit is not due to the District's actions. Therefore, the Parents' are not entitled to compensatory relief.

51. The administrative law judge has considered all arguments made by the parties. Arguments that are not specifically addressed have been duly considered but are found to have no merit or to not substantially affect a party's rights.

ORDER

1. The District provided the Student a FAPE for the 2000-2001 school year. The District's proposed IEP and placement at Wildwood is appropriate.

2. The District's evaluation of the Student is appropriate and the Parents' request for an independent educational evaluation is denied.

3. The multidisciplinary team is directed to review and consider, pursuant to WAC 392-172-150, any new information, evaluations or reports that were brought to light subsequent to the District's evaluation and/or during the course of this hearing.

4. After the District has conducted a functional behavioral assessment and assistive technology evaluation, the IEP team is directed to meet to consider the results of the evaluations and incorporate any of the Student's needs, pursuant to WAC 392-172-159(3) into the IEP.

5. The Parents' request that the District translate all of the Student's records in its possession is denied.

6. The Parents' request for compensatory services is denied. The Parents' request for attorneys fees is denied.

Dated at Seattle, Washington this 30th day of April 2001.

Mattie T. Harvin Woode
Administrative Law Judge
Office of Administrative Hearings

APPENDIX F

20 U.S.C. § 1400. Congressional statements and declarations

(a) Short title

This chapter may be cited as the "Individuals with Disabilities Education Act".

(b) Omitted

(c) Findings

The Congress finds the following:

(1) Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.

(2) Before the date of the enactment of the Education for All Handicapped Children Act of 1975 (Public Law 94-142) –

(A) the special educational needs of children with disabilities were not being fully met;

(B) more than one-half of the children with disabilities in the United States did not receive appropriate educational services that would enable such children to have full equality of opportunity;

(C) 1,000,000 of the children with disabilities in the United States were excluded entirely from the public school system and did not go through the educational process with their peers;

(D) there were many children with disabilities throughout the United States participating in regular school programs whose disabilities prevented such children from having a successful educational experience because their disabilities were undetected; and

(E) because of the lack of adequate services within the public school system, families were often forced to find services outside the public school system, often at great distance from their residence and at their own expense.

(3) Since the enactment and implementation of the Education for All Handicapped Children Act of 1975, this chapter has been successful in ensuring children with disabilities and the families of such children access to a free appropriate public education and in improving educational results for children with disabilities.

(4) However, the implementation of this chapter has been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities.

(5) Over 20 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by –

(A) having high expectations for such children and ensuring their access in the general curriculum to the maximum extent possible;

(B) strengthening the role of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home;

(C) coordinating this chapter with other local, educational service agency, State, and Federal school improvement efforts in order to ensure that such children benefit from such efforts and that special education can become a service for such children rather than a place where they are sent;

(D) providing appropriate special education and related services and aids and supports in the regular classroom to such children, whenever appropriate;

(E) supporting high-quality, intensive professional development for all personnel who work with such children in order to ensure that they have the skills and knowledge necessary to enable them –

(i) to meet developmental goals and, to the maximum extent possible, those challenging expectations that have been established for all children; and

(ii) to be prepared to lead productive, independent, adult lives, to the maximum extent possible;

(F) providing incentives for whole-school approaches and pre-referral intervention to reduce the need to label children as disabled in order to address their learning needs; and

(G) focusing resources on teaching and learning while reducing paperwork and requirements that do not assist in improving educational results.

(6) While States, local educational agencies, and educational service agencies are responsible for providing an education for all children with disabilities,

it is in the national interest that the Federal Government have a role in assisting State and local efforts to educate children with disabilities in order to improve results for such children and to ensure equal protection of the law.

(7)(A) The Federal Government must be responsive to the growing needs of an increasingly more diverse society. A more equitable allocation of resources is essential for the Federal Government to meet its responsibility to provide an equal educational opportunity for all individuals.

(B) America's racial profile is rapidly changing. Between 1980 and 1990, the rate of increase in the population for white Americans was 6 percent, while the rate of increase for racial and ethnic minorities was much higher: 53 percent for Hispanics, 13.2 percent for African-Americans, and 107.8 percent for Asians.

(C) By the year 2000, this Nation will have 275,000,000 people, nearly one of every three of whom will be either African-American, Hispanic, Asian-American, or American Indian.

(D) Taken together as a group, minority children are comprising an ever larger percentage of public school students. Large-city school populations are overwhelmingly minority, for example: for fall 1993, the figure for Miami was 84 percent; Chicago, 89 percent; Philadelphia, 78 percent; Baltimore, 84 percent; Houston, 88 percent; and Los Angeles, 88 percent.

(E) Recruitment efforts within special education must focus on bringing larger numbers of minorities into the profession in order to provide appropriate practitioner knowledge, role models,

and sufficient manpower to address the clearly changing demography of special education.

(F) The limited English proficient population is the fastest growing in our Nation, and the growth is occurring in many parts of our Nation. In the Nation's 2 largest school districts, limited English proficient students make up almost half of all students initially entering school at the kindergarten level. Studies have documented apparent discrepancies in the levels of referral and placement of limited English proficient children in special education. The Department of Education has found that services provided to limited English proficient students often do not respond primarily to the pupil's academic needs. These trends pose special challenges for special education in the referral, assessment, and services for our Nation's students from non-English language backgrounds.

(8)(A) Greater efforts are needed to prevent the intensification of problems connected with mislabeling and high dropout rates among minority children with disabilities.

(B) More minority children continue to be served in special education than would be expected from the percentage of minority students in the general school population.

(C) Poor African-American children are 2.3 times more likely to be identified by their teacher as having mental retardation than their white counterpart.

(D) Although African-Americans represent 16 percent of elementary and secondary enrollments, they constitute 21 percent of total enrollments in special education.

(E) The drop-out rate is 68 percent higher for minorities than for whites.

(F) More than 50 percent of minority students in large cities drop out of school.

(9)(A) The opportunity for full participation in awards for grants and contracts; boards of organizations receiving funds under this chapter; and peer review panels; and training of professionals in the area of special education by minority individuals, organizations, and historically black colleges and universities is essential if we are to obtain greater success in the education of minority children with disabilities.

(B) In 1993, of the 915,000 college and university professors, 4.9 percent were African-American and 2.4 percent were Hispanic. Of the 2,940,000 teachers, prekindergarten through high school, 6.8 percent were African-American and 4.1 percent were Hispanic.

(C) Students from minority groups comprise more than 50 percent of K-12 public school enrollment in seven States yet minority enrollment in teacher training programs is less than 15 percent in all but six States.

(D) As the number of African-American and Hispanic students in special education increases, the number of minority teachers and related service personnel produced in our colleges and universities continues to decrease.

(E) Ten years ago, 12 percent of the United States teaching force in public elementary and secondary schools were members of a minority group. Minorities comprised 21 percent of the national population at that time and were clearly underrepresented then among employed teachers.

Today, the elementary and secondary teaching force is 13 percent minority, while one-third of the students in public schools are minority children.

(F) As recently as 1991, historically black colleges and universities enrolled 44 percent of the African-American teacher trainees in the Nation. However, in 1993, historically black colleges and universities received only 4 percent of the discretionary funds for special education and related services personnel training under this chapter.

(G) While African-American students constitute 28 percent of total enrollment in special education, only 11.2 percent of individuals enrolled in preservice training programs for special education are African-American.

(H) In 1986-87, of the degrees conferred in education at the B.A., M.A., and Ph.D. levels, only 6, 8, and 8 percent, respectively, were awarded to African-American or Hispanic students.

(10) Minorities and underserved persons are socially disadvantaged because of the lack of opportunities in training and educational programs, undergirded by the practices in the private sector that impede their full participation in the mainstream of society.

(d) Purposes

The purposes of this chapter are –

(1)(A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related

services designed to meet their unique needs and prepare them for employment and independent living;

(B) to ensure that the rights of children with disabilities and parents of such children are protected; and

(C) to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities;

(2) to assist States in the implementation of a statewide, comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families;

(3) to ensure that educators and parents have the necessary tools to improve educational results for children with disabilities by supporting systemic-change activities; coordinated research and personnel preparation; coordinated technical assistance, dissemination, and support; and technology development and media services; and

(4) to assess, and ensure the effectiveness of, efforts to educate children with disabilities.

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20 U.S.C. § 1414. Evaluations, eligibility determinations, individualized education programs, and educational placements

(a) Evaluations and reevaluations

(1) Initial evaluations

(A) In general

A State educational agency, other State agency, or local educational agency shall conduct

a full and individual initial evaluation, in accordance with this paragraph and subsection (b) of this section, before the initial provision of special education and related services to a child with a disability under this subchapter.

(B) Procedures

Such initial evaluation shall consist of procedures –

(i) to determine whether a child is a child with a disability (as defined in section 1401(3) of this title); and

(ii) to determine the educational needs of such child.

(C) Parental consent

(i) In general

The agency proposing to conduct an initial evaluation to determine if the child qualifies as a child with a disability as defined in section 1401(3)(A) or 1401(3)(B) of this title shall obtain an informed consent from the parent of such child before the evaluation is conducted. Parental consent for evaluation shall not be construed as consent for placement for receipt of special education and related services.

(ii) Refusal

If the parents of such child refuse consent for the evaluation, the agency may continue to pursue an evaluation by utilizing the mediation and due process procedures under section 1415 of this title, except to the

extent inconsistent with State law relating to parental consent.

(2) Reevaluations

A local educational agency shall ensure that a reevaluation of each child with a disability is conducted –

(A) if conditions warrant a reevaluation or if the child's parent or teacher requests a reevaluation, but at least once every 3 years; and

(B) in accordance with subsections (b) and (c) of this section.

(b) Evaluation procedures

(1) Notice

The local educational agency shall provide notice to the parents of a child with a disability, in accordance with subsections (b)(3), (b)(4), and (c) of section 1415 of this title, that describes any evaluation procedures such agency proposes to conduct.

(2) Conduct of evaluation

In conducting the evaluation, the local educational agency shall –

(A) use a variety of assessment tools and strategies to gather relevant functional and developmental information, including information provided by the parent, that may assist in determining whether the child is a child with a disability and the content of the child's individualized education program, including information related to enabling the child to be involved in and progress in the general curriculum or, for preschool children, to participate in appropriate activities;

(B) not use any single procedure as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child; and

(C) use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

(3) Additional requirements

Each local educational agency shall ensure that –

(A) tests and other evaluation materials used to assess a child under this section –

(i) are selected and administered so as not to be discriminatory on a racial or cultural basis; and

(ii) are provided and administered in the child's native language or other mode of communication, unless it is clearly not feasible to do so; and

(B) any standardized tests that are given to the child –

(i) have been validated for the specific purpose for which they are used;

(ii) are administered by trained and knowledgeable personnel; and

(iii) are administered in accordance with any instructions provided by the producer of such tests;

(C) the child is assessed in all areas of suspected disability; and

(D) assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided.

(4) Determination of eligibility

Upon completion of administration of tests and other evaluation materials –

(A) the determination of whether the child is a child with a disability as defined in section 1401(3) of this title shall be made by a team of qualified professionals and the parent of the child in accordance with paragraph (5); and

(B) a copy of the evaluation report and the documentation of determination of eligibility will be given to the parent.

(5) Special rule for eligibility determination

In making a determination of eligibility under paragraph (4)(A), a child shall not be determined to be a child with a disability if the determinant factor for such determination is lack of instruction in reading or math or limited English proficiency.

(c) Additional requirements for evaluation and reevaluations

(1) Review of existing evaluation data

As part of an initial evaluation (if appropriate) and as part of any reevaluation under this section, the IEP Team described in subsection (d)(1)(B) of this section and other qualified professionals, as appropriate, shall –

(A) review existing evaluation data on the child, including evaluations and information provided by the parents of the child, current classroom-based assessments and observations, and teacher and related services providers observation; and

(B) on the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine –

(i) whether the child has a particular category of disability, as described in section 1401(3) of this title, or, in case of a reevaluation of a child, whether the child continues to have such a disability;

(ii) the present levels of performance and educational needs of the child;

(iii) whether the child needs special education and related services, or in the case of a reevaluation of a child, whether the child continues to need special education and related services; and

(iv) whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the individualized education program of the child and to participate, as appropriate, in the general curriculum.

(2) Source of data

The local educational agency shall administer such tests and other evaluation materials as may be needed to produce the data identified by the IEP Team under paragraph (1)(B).

(3) Parental consent

Each local educational agency shall obtain informed parental consent, in accordance with subsection (a)(1)(C) of this section, prior to conducting any reevaluation of a child with a disability, except that such informed parent consent need not be obtained if the local educational agency can demonstrate that it had taken reasonable measures to obtain such consent and the child's parent has failed to respond.

(4) Requirements if additional data are not needed

If the IEP Team and other qualified professionals, as appropriate, determine that no additional data are needed to determine whether the child continues to be a child with a disability, the local educational agency –

(A) shall notify the child's parents of –

(i) that determination and the reasons for it; and

(ii) the right of such parents to request an assessment to determine whether the child continues to be a child with a disability; and

(B) shall not be required to conduct such an assessment unless requested to by the child's parents.

(5) Evaluations before change in eligibility

A local educational agency shall evaluate a child with a disability in accordance with this section before determining that the child is no longer a child with a disability.

(d) Individualized education programs

(1) Definitions

As used in this chapter:

(A) Individualized education program

The term "individualized education program" or "IEP" means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes –

(i) a statement of the child's present levels of educational performance, including –

(I) how the child's disability affects the child's involvement and progress in the general curriculum; or

(II) for preschool children, as appropriate, how the disability affects the child's participation in appropriate activities;

(ii) a statement of measurable annual goals, including benchmarks or short-term objectives, related to –

(I) meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum; and

(II) meeting each of the child's other educational needs that result from the child's disability;

(iii) a statement of the special education and related services and supplementary aids and services to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child –

(I) to advance appropriately toward attaining the annual goals;

(II) to be involved and progress in the general curriculum in accordance with clause (i) and to participate in extracurricular and other nonacademic activities; and

(III) to be educated and participate with other children with disabilities and nondisabled children in the activities described in this paragraph;

(iv) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in clause (iii);

(v)(I) a statement of any individual modifications in the administration of State or districtwide assessments of student achievement that are needed in order for the child to participate in such assessment; and

(II) if the IEP Team determines that the child will not participate in a particular State or

districtwide assessment of student achievement (or part of such an assessment), a statement of –

(aa) why that assessment is not appropriate for the child; and

(bb) how the child will be assessed;

(vi) the projected date for the beginning of the services and modifications described in clause (iii), and the anticipated frequency, location, and duration of those services and modifications;

(vii)(I) beginning at age 14, and updated annually, a statement of the transition service needs of the child under the applicable components of the child's IEP that focuses on the child's courses of study (such as participation in advanced-placement courses or a vocational education program);

(II) beginning at age 16 (or younger, if determined appropriate by the IEP Team), a statement of needed transition services for the child, including, when appropriate, a statement of the interagency responsibilities or any needed linkages; and

(III) beginning at least one year before the child reaches the age of majority under State law, a statement that the child has been

informed of his or her rights under this chapter, if any, that will transfer to the child on reaching the age of majority under section 1415(m) of this title; and

(viii) a statement of –

(I) how the child's progress toward the annual goals described in clause (ii) will be measured; and

(II) how the child's parents will be regularly informed (by such means as periodic report cards), at least as often as parents are informed of their nondisabled children's progress, of –

(aa) their child's progress toward the annual goals described in clause (ii); and

(bb) the extent to which that progress is sufficient to enable the child to achieve the goals by the end of the year.

(B) Individualized education program team

The term "individualized education program team" or "IEP Team" means a group of individuals composed of –

(i) the parents of a child with a disability;

(ii) at least one regular education teacher of such child (if the child is, or

may be, participating in the regular education environment);

(iii) at least one special education teacher, or where appropriate, at least one special education provider of such child;

(iv) a representative of the local educational agency who –

(I) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;

(II) is knowledgeable about the general curriculum; and

(III) is knowledgeable about the availability of resources of the local educational agency;

(v) an individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in clauses (ii) through (vi);

(vi) at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and

(vii) whenever appropriate, the child with a disability.

(2) Requirement that program be in effect

(A) In general

At the beginning of each school year, each local educational agency, State educational agency, or other State agency, as the case may be, shall have in effect, for each child with a disability in its jurisdiction, an individualized education program, as defined in paragraph (1)(A).

(B) Program for child aged 3 through 5

In the case of a child with a disability aged 3 through 5 (or, at the discretion of the State educational agency, a 2 year-old child with a disability who will turn age 3 during the school year), an individualized family service plan that contains the material described in section 1436 of this title, and that is developed in accordance with this section, may serve as the IEP of the child if using that plan as the IEP is –

(i) consistent with State policy; and

(ii) agreed to by the agency and the child's parents.

(3) Development of IEP

(A) In general

In developing each child's IEP, the IEP Team, subject to subparagraph (C), shall consider –

(i) the strengths of the child and the concerns of the parents for enhancing the education of their child; and

(ii) the results of the initial evaluation or most recent evaluation of the child.

(B) Consideration of special factors

The IEP Team shall –

(i) in the case of a child whose behavior impedes his or her learning or that of others, consider, when appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior;

(ii) in the case of a child with limited English proficiency, consider the language needs of the child as such needs relate to the child's IEP;

(iii) in the case of a child who is blind or visually impaired, provide for instruction in Braille and the use of Braille unless the IEP Team determines, after an evaluation of the child's reading and writing skills, needs, and appropriate reading and writing media (including an evaluation of the child's future needs for instruction in Braille or the use of Braille), that instruction in Braille or the use of Braille is not appropriate for the child;

(iv) consider the communication needs of the child, and in the case of a child who is deaf or hard of hearing, consider the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child's language and communication mode; and

(v) consider whether the child requires assistive technology devices and services.

(C) Requirement with respect to regular education teacher

The regular education teacher of the child, as a member of the IEP Team, shall, to the extent appropriate, participate in the development of the IEP of the child, including the determination of appropriate positive behavioral interventions and strategies and the determination of supplementary aids and services, program modifications, and support for school personnel consistent with paragraph (1)(A)(iii).

(4) Review and revision of IEP

(A) In general

The local educational agency shall ensure that, subject to subparagraph (B), the IEP Team –

(i) reviews the child's IEP periodically, but not less than annually to determine whether the annual goals for the child are being achieved; and

(ii) revises the IEP as appropriate to address –

(I) any lack of expected progress toward the annual goals and in the general curriculum, where appropriate;

(II) the results of any reevaluation conducted under this section;

(III) information about the child provided to, or by, the parents, as described in subsection (c)(1)(B) of this section;

(IV) the child's anticipated needs; or

(V) other matters.

(B) Requirement with respect to regular education teacher

The regular education teacher of the child, as a member of the IEP Team, shall, to the extent appropriate, participate in the review and revision of the IEP of the child.

(5) Failure to meet transition objectives

If a participating agency, other than the local educational agency, fails to provide the transition services described in the IEP in accordance with paragraph (1)(A)(vii), the local educational agency shall reconvene the IEP Team to identify alternative strategies to meet the transition objectives for the child set out in that program.

(6) Children with disabilities in adult prisons

(A) In general

The following requirements do not apply to children with disabilities who are convicted as adults under State law and incarcerated in adult prisons:

(i) The requirements contained in section 1412(a)(17) of this title and paragraph (1)(A)(v) of this subsection (relating to participation of children with disabilities in general assessments).

(ii) The requirements of subclauses (I) and (II) of paragraph (1)(A)(vii) of this subsection (relating to transition planning and

transition services), do not apply with respect to such children whose eligibility under this subchapter will end, because of their age, before they will be released from prison.

(B) Additional requirement

If a child with a disability is convicted as an adult under State law and incarcerated in an adult prison, the child's IEP Team may modify the child's IEP or placement notwithstanding the requirements of section 1412(a)(5)(A) of this title and subsection (d)(1)(A) of this section if the State has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated.

(e) Construction

Nothing in this section shall be construed to require the IEP Team to include information under one component of a child's IEP that is already contained under another component of such IEP.

(f) Educational placements

Each local educational agency or State educational agency shall ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child.

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20 U.S.C. § 1415. Procedural safeguards

(a) Establishment of procedures

Any State educational agency, State agency, or local educational agency that receives assistance under this subchapter shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies.

(b) Types of procedures

The procedures required by this section shall include –

(1) an opportunity for the parents of a child with a disability to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(2) procedures to protect the rights of the child whenever the parents of the child are not known, the agency cannot, after reasonable efforts, locate the parents, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, the local educational agency, or any other agency that is involved in the education or care of the child) to act as a surrogate for the parents;

(3) written prior notice to the parents of the child whenever such agency –

(A) proposes to initiate or change; or

(B) refuses to initiate or change; the identification, evaluation, or educational placement of the child, in accordance with subsection (c) of this section, or the provision of a free appropriate public education to the child;

(4) procedures designed to ensure that the notice required by paragraph (3) is in the native language of the parents, unless it clearly is not feasible to do so;

(5) an opportunity for mediation in accordance with subsection (e) of this section;

(6) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child;

(7) procedures that require the parent of a child with a disability, or the attorney representing the child, to provide notice (which shall remain confidential) –

(A) to the State educational agency or local educational agency, as the case may be, in the complaint filed under paragraph (6); and

(B) that shall include –

(i) the name of the child, the address of the residence of the child, and the name of the school the child is attending;

(ii) a description of the nature of the problem of the child relating to such proposed initiation or change, including facts relating to such problem; and

(iii) a proposed resolution of the problem to the extent known and available to the parents at the time; and

(8) procedures that require the State educational agency to develop a model form to assist parents in filing a complaint in accordance with paragraph (7).

(c) Content of prior written notice

The notice required by subsection (b)(3) of this section shall include –

(1) a description of the action proposed or refused by the agency;

(2) an explanation of why the agency proposes or refuses to take the action;

(3) a description of any other options that the agency considered and the reasons why those options were rejected;

(4) a description of each evaluation procedure, test, record, or report the agency used as a basis for the proposed or refused action;

(5) a description of any other factors that are relevant to the agency's proposal or refusal;

(6) a statement that the parents of a child with a disability have protection under the procedural safeguards of this subchapter and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained; and

(7) sources for parents to contact to obtain assistance in understanding the provisions of this subchapter.

(d) Procedural safeguards notice

(1) In general

A copy of the procedural safeguards available to the parents of a child with a disability shall be given to the parents, at a minimum –

(A) upon initial referral for evaluation;

(B) upon each notification of an individualized education program meeting and upon reevaluation of the child; and

(C) upon registration of a complaint under subsection (b)(6) of this section.

(2) Contents

The procedural safeguards notice shall include a full explanation of the procedural safeguards, written in the native language of the parents, unless it clearly is not feasible to do so, and written in an easily understandable manner, available under this section and under regulations promulgated by the Secretary relating to –

(A) independent educational evaluation;

(B) prior written notice;

(C) parental consent;

(D) access to educational records;

(E) opportunity to present complaints;

(F) the child's placement during pendency of due process proceedings;

(G) procedures for students who are subject to placement in an interim alternative educational setting;

(H) requirements for unilateral placement by parents of children in private schools at public expense;

(I) mediation;

(J) due process hearings, including requirements for disclosure of evaluation results and recommendations;

(K) State-level appeals (if applicable in that State);

(L) civil actions; and

(M) attorneys' fees.

(e) Mediation

(1) In general

Any State educational agency or local educational agency that receives assistance under this subchapter shall ensure that procedures are established and implemented to allow parties to disputes involving any matter described in subsection (b)(6) of this section to resolve such disputes through a mediation process which, at a minimum, shall be available whenever a hearing is requested under subsection (f) or (k) of this section.

(2) Requirements

Such procedures shall meet the following requirements:

(A) The procedures shall ensure that the mediation process –

(i) is voluntary on the part of the parties;

(ii) is not used to deny or delay a parent's right to a due process hearing under subsection (f) of this section, or to deny any other rights afforded under this subchapter; and

(iii) is conducted by a qualified and impartial mediator who is trained in effective mediation techniques.

(B) A local educational agency or a State agency may establish procedures to require parents who choose not to use the mediation process to meet, at a time and location convenient to the parents, with a disinterested party who is under contract with –

(i) a parent training and information center or community parent resource center in the State established under section 1482 or 1483 of this title; or

(ii) an appropriate alternative dispute resolution entity; to encourage the use, and explain the benefits, of the mediation process to the parents.

(C) The State shall maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services.

(D) The State shall bear the cost of the mediation process, including the costs of meetings described in subparagraph (B).

(E) Each session in the mediation process shall be scheduled in a timely manner and shall be held in a location that is convenient to the parties to the dispute.

(F) An agreement reached by the parties to the dispute in the mediation process shall be set forth in a written mediation agreement.

(G) Discussions that occur during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearings or civil proceedings and the parties to the mediation process may be required to sign a confidentiality pledge prior to the commencement of such process.

(f) Impartial due process hearing

(1) In general

Whenever a complaint has been received under subsection (b)(6) or (k) of this section, the parents involved in such complaint shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency.

(2) Disclosure of evaluations and recommendations

(A) In general

At least 5 business days prior to a hearing conducted pursuant to paragraph (1), each party shall disclose to all other parties all evaluations completed by that date and recommendations based on the offering party's evaluations that the party intends to use at the hearing.

(B) Failure to disclose

A hearing officer may bar any party that fails to comply with subparagraph (A) from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.

(3) Limitation on conduct of hearing

A hearing conducted pursuant to paragraph (1) may not be conducted by an employee of the State educational agency or the local educational agency involved in the education or care of the child.

(g) Appeal

If the hearing required by subsection (f) of this section is conducted by a local educational agency, any party aggrieved by the findings and decision rendered in such a hearing may appeal such findings and decision to the State educational agency. Such agency shall conduct an impartial review of such decision. The officer conducting such review shall make an independent decision upon completion of such review.

(h) Safeguards

Any party to a hearing conducted pursuant to subsection (f) or (k) of this section, or an appeal conducted pursuant to subsection (g) of this section, shall be accorded –

(1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;

(2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses;

(3) the right to a written, or, at the option of the parents, electronic verbatim record of such hearing; and

(4) the right to written, or, at the option of the parents, electronic findings of fact and decisions (which findings and decisions shall be made available

to the public consistent with the requirements of section 1417(c) of this title (relating to the confidentiality of data, information, and records) and shall also be transmitted to the advisory panel established pursuant to section 1412(a)(21) of this title).

(i) Administrative procedures

(1) In general

(A) Decision made in hearing

A decision made in a hearing conducted pursuant to subsection (f) or (k) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (g) of this section and paragraph (2) of this subsection.

(B) Decision made at appeal

A decision made under subsection (g) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Right to bring civil action

(A) In general

Any party aggrieved by the findings and decision made under subsection (f) or (k) of this section who does not have the right to an appeal under subsection (g) of this section, and any party aggrieved by the findings and decision under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United

States without regard to the amount in controversy.

(B) Additional requirements

In any action brought under this paragraph, the court –

(i) shall receive the records of the administrative proceedings;

(ii) shall hear additional evidence at the request of a party; and

(iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) Jurisdiction of district courts; attorneys' fees

(A) In general

The district courts of the United States shall have jurisdiction of actions brought under this section without regard to the amount in controversy.

(B) Award of attorneys' fees

In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party.

(C) Determination of amount of attorneys' fees

Fees awarded under this paragraph shall be based on rates prevailing in the community in which the action or proceeding arose for the kind

and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.

(D) Prohibition of attorneys' fees and related costs for certain services

(i) Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under this section for services performed subsequent to the time of a written offer of settlement to a parent if –

(I) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins;

(II) the offer is not accepted within 10 days; and

(III) the court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

(ii) Attorneys' fees may not be awarded relating to any meeting of the IEP Team unless such meeting is convened as a result of an administrative proceeding or judicial action, or, at the discretion of the State, for a mediation described in subsection (e) of this section that is conducted prior to the filing of a complaint under subsection (b)(6) or (k) of this section.

(E) Exception to prohibition on attorneys' fees and related costs

Notwithstanding subparagraph (D), an award of attorneys' fees and related costs may be made

to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(F) Reduction in amount of attorneys' fees

Except as provided in subparagraph (G), whenever the court finds that –

(i) the parent, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience;

(iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding; or

(iv) the attorney representing the parent did not provide to the school district the appropriate information in the due process complaint in accordance with subsection (b)(7) of this section; the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this section.

(G) Exception to reduction in amount of attorneys' fees

The provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section.

(j) Maintenance of current educational placement

Except as provided in subsection (k)(7) of this section, during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

(k) Placement in alternative educational setting

(1) Authority of school personnel

(A) School personnel under this section may order a change in the placement of a child with a disability –

(i) to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 school days (to the extent such alternatives would be applied to children without disabilities); and

(ii) to an appropriate interim alternative educational setting for the same amount of time that a child without a disability would be subject to discipline, but for not more than 45 days if –

(I) the child carries or possesses a weapon to or at school, on school premises, or to or at a school function under the jurisdiction of a State or a local educational agency; or

(II) the child knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance while at school or a

school function under the jurisdiction of a State or local educational agency.

(B) Either before or not later than 10 days after taking a disciplinary action described in subparagraph (A) –

(i) if the local educational agency did not conduct a functional behavioral assessment and implement a behavioral intervention plan for such child before the behavior that resulted in the suspension described in subparagraph (A), the agency shall convene an IEP meeting to develop an assessment plan to address that behavior; or

(ii) if the child already has a behavioral intervention plan, the IEP Team shall review the plan and modify it, as necessary, to address the behavior.

(2) Authority of hearing officer

A hearing officer under this section may order a change in the placement of a child with a disability to an appropriate interim alternative educational setting for not more than 45 days if the hearing officer –

(A) determines that the public agency has demonstrated by substantial evidence that maintaining the current placement of such child is substantially likely to result in injury to the child or to others;

(B) considers the appropriateness of the child's current placement;

(C) considers whether the public agency has made reasonable efforts to minimize the risk

of harm in the child's current placement, including the use of supplementary aids and services; and

(D) determines that the interim alternative educational setting meets the requirements of paragraph (3)(B).

(3) Determination of setting

(A) In general

The alternative educational setting described in paragraph (1)(A)(ii) shall be determined by the IEP Team.

(B) Additional requirements

Any interim alternative educational setting in which a child is placed under paragraph (1) or (2) shall –

(i) be selected so as to enable the child to continue to participate in the general curriculum, although in another setting, and to continue to receive those services and modifications, including those described in the child's current IEP, that will enable the child to meet the goals set out in that IEP; and

(ii) include services and modifications designed to address the behavior described in paragraph (1) or paragraph (2) so that it does not recur.

(4) Manifestation determination review

(A) In general

If a disciplinary action is contemplated as described in paragraph (1) or paragraph (2) for a behavior of a child with a disability described in

either of those paragraphs, or if a disciplinary action involving a change of placement for more than 10 days is contemplated for a child with a disability who has engaged in other behavior that violated any rule or code of conduct of the local educational agency that applies to all children –

(i) not later than the date on which the decision to take that action is made, the parents shall be notified of that decision and of all procedural safeguards accorded under this section; and

(ii) immediately, if possible, but in no case later than 10 school days after the date on which the decision to take that action is made, a review shall be conducted of the relationship between the child's disability and the behavior subject to the disciplinary action.

(B) Individuals to carry out review

A review described in subparagraph (A) shall be conducted by the IEP Team and other qualified personnel.

(C) Conduct of review

In carrying out a review described in subparagraph (A), the IEP Team may determine that the behavior of the child was not a manifestation of such child's disability only if the IEP Team –

(i) first considers, in terms of the behavior subject to disciplinary action, all relevant information, including –

(I) evaluation and diagnostic results, including such results or other relevant information supplied by the parents of the child;

(II) observations of the child; and

(III) the child's IEP and placement; and

(ii) then determines that –

(I) in relationship to the behavior subject to disciplinary action, the child's IEP and placement were appropriate and the special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the child's IEP and placement;

(II) the child's disability did not impair the ability of the child to understand the impact and consequences of the behavior subject to disciplinary action; and

(III) the child's disability did not impair the ability of the child to control the behavior subject to disciplinary action.

(5) Determination that behavior was not manifestation of disability

(A) In general

If the result of the review described in paragraph (4) is a determination, consistent with paragraph (4)(C), that the behavior of the child with a disability was not a manifestation of the

child's disability, the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner in which they would be applied to children without disabilities, except as provided in section 1412(a)(1) of this title.

(B) Additional requirement

If the public agency initiates disciplinary procedures applicable to all children, the agency shall ensure that the special education and disciplinary records of the child with a disability are transmitted for consideration by the person or persons making the final determination regarding the disciplinary action.

(6) Parent appeal

(A) In general

(i) If the child's parent disagrees with a determination that the child's behavior was not a manifestation of the child's disability or with any decision regarding placement, the parent may request a hearing.

(ii) The State or local educational agency shall arrange for an expedited hearing in any case described in this subsection when requested by a parent.

(B) Review of decision

(i) In reviewing a decision with respect to the manifestation determination, the hearing officer shall determine whether the public agency has demonstrated that the child's behavior was not a manifestation of such child's disability consistent with the requirements of paragraph (4)(C).

(ii) In reviewing a decision under paragraph (1)(A)(ii) to place the child in an interim alternative educational setting, the hearing officer shall apply the standards set out in paragraph (2).

(7) Placement during appeals

(A) In general

When a parent requests a hearing regarding a disciplinary action described in paragraph (1)(A)(ii) or paragraph (2) to challenge the interim alternative educational setting or the manifestation determination, the child shall remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the time period provided for in paragraph (1)(A)(ii) or paragraph (2), whichever occurs first, unless the parent and the State or local educational agency agree otherwise.

(B) Current placement

If a child is placed in an interim alternative educational setting pursuant to paragraph (1)(A)(ii) or paragraph (2) and school personnel propose to change the child's placement after expiration of the interim alternative placement, during the pendency of any proceeding to challenge the proposed change in placement, the child shall remain in the current placement (the child's placement prior to the interim alternative educational setting), except as provided in subparagraph (C).

(C) Expedited hearing

(i) If school personnel maintain that it is dangerous for the child to be in the current

placement (placement prior to removal to the interim alternative education setting) during the pendency of the due process proceedings, the local educational agency may request an expedited hearing.

(ii) In determining whether the child may be placed in the alternative educational setting or in another appropriate placement ordered by the hearing officer, the hearing officer shall apply the standards set out in paragraph (2).

(8) Protections for children not yet eligible for special education and related services

(A) In general

A child who has not been determined to be eligible for special education and related services under this subchapter and who has engaged in behavior that violated any rule or code of conduct of the local educational agency, including any behavior described in paragraph (1), may assert any of the protections provided for in this subchapter if the local educational agency had knowledge (as determined in accordance with this paragraph) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

(B) Basis of knowledge

A local educational agency shall be deemed to have knowledge that a child is a child with a disability if –

(i) the parent of the child has expressed concern in writing (unless the parent is illiterate or has a disability that prevents compliance with the requirements

contained in this clause) to personnel of the appropriate educational agency that the child is in need of special education and related services;

(ii) the behavior or performance of the child demonstrates the need for such services;

(iii) the parent of the child has requested an evaluation of the child pursuant to section 1414 of this title; or

(iv) the teacher of the child, or other personnel of the local educational agency, has expressed concern about the behavior or performance of the child to the director of special education of such agency or to other personnel of the agency.

(C) Conditions that apply if no basis of knowledge

(i) In general

If a local educational agency does not have knowledge that a child is a child with a disability (in accordance with subparagraph (B)) prior to taking disciplinary measures against the child, the child may be subjected to the same disciplinary measures as measures applied to children without disabilities who engaged in comparable behaviors consistent with clause (ii).

(ii) Limitations

If a request is made for an evaluation of a child during the time period in which the child is subjected to disciplinary measures under paragraph (1) or (2), the evaluation

shall be conducted in an expedited manner. If the child is determined to be a child with a disability, taking into consideration information from the evaluation conducted by the agency and information provided by the parents, the agency shall provide special education and related services in accordance with the provisions of this subchapter, except that, pending the results of the evaluation, the child shall remain in the educational placement determined by school authorities.

(9) Referral to and action by law enforcement and judicial authorities

(A) Nothing in this subchapter shall be construed to prohibit an agency from reporting a crime committed by a child with a disability to appropriate authorities or to prevent State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability.

(B) An agency reporting a crime committed by a child with a disability shall ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom it reports the crime.

(10) Definitions

For purposes of this subsection, the following definitions apply:

(A) Controlled substance

The term "controlled substance" means a drug or other substance identified under schedules I, II,

III, IV, or V in section 202(c) of the Controlled Substances Act (21 U.S.C. 812 (c)).

(B) Illegal drug

The term "illegal drug" –

(i) means a controlled substance; but

(ii) does not include such a substance that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any other authority under that Act [21 U.S.C. 801 et seq.] or under any other provision of Federal law.

(C) Substantial evidence

The term "substantial evidence" means beyond a preponderance of the evidence.

(D) Weapon

The term "weapon" has the meaning given the term "dangerous weapon" under paragraph (2) of the first subsection (g) of section 930 of title 18.

(l) Rule of construction

Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 [42 U.S.C. 12101 et seq.], title V of the Rehabilitation Act of 1973 [29 U.S.C. 790 et seq.], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and

(g) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

(m) Transfer of parental rights at age of majority

(1) In general

A State that receives amounts from a grant under this subchapter may provide that, when a child with a disability reaches the age of majority under State law (except for a child with a disability who has been determined to be incompetent under State law) –

(A) the public agency shall provide any notice required by this section to both the individual and the parents;

(B) all other rights accorded to parents under this subchapter transfer to the child;

(C) the agency shall notify the individual and the parents of the transfer of rights; and

(D) all rights accorded to parents under this subchapter transfer to children who are incarcerated in an adult or juvenile Federal, State, or local correctional institution.

(2) Special rule

If, under State law, a child with a disability who has reached the age of majority under State law, who has not been determined to be incompetent, but who is determined not to have the ability to provide informed consent with respect to the educational program of the child, the State shall establish procedures for appointing the parent of the child, or if the parent is not available, another appropriate individual, to

represent the educational interests of the child throughout the period of eligibility of the child under this subchapter.

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34 C.F.R. § 300.344 IEP team.

(a) *General.* The public agency shall ensure that the IEP team for each child with a disability includes –

(1) The parents of the child;

(2) At least one regular education teacher of the child (if the child is, or may be, participating in the regular education environment);

(3) At least one special education teacher of the child, or if appropriate, at least one special education provider of the child;

(4) A representative of the public agency who –

(i) Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;

(ii) Is knowledgeable about the general curriculum; and

(iii) Is knowledgeable about the availability of resources of the public agency;

(5) An individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in paragraphs (a)(2) through (6) of this section;

(6) At the discretion of the parent or the agency, other individuals who have knowledge or special

expertise regarding the child, including related services personnel as appropriate; and

(7) If appropriate, the child.

(b) *Transition services participants.* (1) Under paragraph (a)(7) of this section, the public agency shall invite a student with a disability of any age to attend his or her IEP meeting if a purpose of the meeting will be the consideration of –

(i) The student's transition services needs under Sec. 300.347(b)(1);

(ii) The needed transition services for the student under Sec. 300.347(b)(2); or

(iii) Both.

(2) If the student does not attend the IEP meeting, the public agency shall take other steps to ensure that the student's preferences and interests are considered.

(3) (i) In implementing the requirements of Sec. 300.347(b)(2), the public agency also shall invite a representative of any other agency that is likely to be responsible for providing or paying for transition services.

(ii) If an agency invited to send a representative to a meeting does not do so, the public agency shall take other steps to obtain participation of the other agency in the planning of any transition services.

(c) *Determination of knowledge and special expertise.* The determination of the knowledge or special expertise of any individual described in paragraph (a)(6) of this section shall be made by the party (parents or public agency) who invited the individual to be a member of the IEP.

(d) *Designating a public agency representative.* A public agency may designate another public agency member of the IEP team to also serve as the agency representative, if the criteria in paragraph (a)(4) of this section are satisfied.

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34 C.F.R. § 300.346 Development, review, and revision of IEP.

(a) *Development of IEP.* (1) *General.* In developing each child's IEP, the IEP team, shall consider –

(i) The strengths of the child and the concerns of the parents for enhancing the education of their child;

(ii) The results of the initial or most recent evaluation of the child; and

(iii) As appropriate, the results of the child's performance on any general State or district-wide assessment programs.

(2) *Consideration of special factors.* The IEP team also shall –

(i) In the case of a child whose behavior impedes his or her learning or that of others, consider, if appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior;

(ii) In the case of a child with limited English proficiency, consider the language needs of the child as those needs relate to the child's IEP;

(iii) In the case of a child who is blind or visually impaired, provide for instruction in Braille and the use of Braille unless the IEP team

determines, after an evaluation of the child's reading and writing skills, needs, and appropriate reading and writing media (including an evaluation of the child's future needs for instruction in Braille or the use of Braille), that instruction in Braille or the use of Braille is not appropriate for the child;

(iv) Consider the communication needs of the child, and in the case of a child who is deaf or hard of hearing, consider the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child's language and communication mode; and

(v) Consider whether the child requires assistive technology devices and services.

(b) *Review and Revision of IEP.* In conducting a meeting to review, and, if appropriate, revise a child's IEP, the IEP team shall consider the factors described in paragraph (a) of this section.

(c) *Statement in IEP.* If, in considering the special factors described in paragraphs (a)(1) and (2) of this section, the IEP team determines that a child needs a particular device or service (including an intervention, accommodation, or other program modification) in order for the child to receive FAPE, the IEP team must include a statement to that effect in the child's IEP.

(d) *Requirement with respect to regular education teacher.* The regular education teacher of a child with a disability, as a member of the IEP team, must, to the extent appropriate, participate in the development, review,

and revision of the child's IEP, including assisting in the determination of –

(1) Appropriate positive behavioral interventions and strategies for the child; and

(2) Supplementary aids and services, program modifications or supports for school personnel that will be provided for the child, consistent with Sec. 300.347(a)(3).

(e) *Construction.* Nothing in this section shall be construed to require the IEP team to include information under one component of a child's IEP that is already contained under another component of the child's IEP.

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34 C.F.R. § 300.552 Placements.

In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency shall ensure that –

(a) The placement decision –

(1) Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and

(2) Is made in conformity with the LRE provisions of this subpart, including Sec. Sec. 300.550-300.554;

(b) The child's placement –

(1) Is determined at least annually;

(2) Is based on the child's IEP; and

(3) Is as close as possible to the child's home;

(c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled;

(d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and

(e) A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general curriculum.

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34 C.F.R. Part 300 Appendix A

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INDIVIDUALIZED EDUCATION PROGRAMS (IEPS) AND OTHER SELECTED IMPLEMENTATION ISSUES

Interpretation of IEP and Other selected Requirements under Part B of the Individuals with Disabilities Education Act (IDEA; Part B)

INTRODUCTION

The IEP requirements under Part B of the IDEA emphasize the importance of three core concepts: (1) the involvement and progress of each child with a disability in the general curriculum including addressing the unique needs that arise out of the child's disability; (2) the involvement of parents and students, together with regular and special education personnel, in making individual decisions to support each student's (child's) educational success, and (3) the preparation of students with disabilities for employment and other post-school activities.

The first three sections of this Appendix (I-III) provide guidance regarding the IEP requirements as they relate to the three core concepts described above. Section IV addresses other questions regarding the development and content of IEPs, including questions about the timelines and responsibility for developing and implementing IEPs, participation in IEP meetings, and IEP content. Section IV also addresses questions on other selected requirements under IDEA.

I. Involvement and Progress of Each Child With a Disability in the General Curriculum

In enacting the IDEA Amendments of 1997, the Congress found that research, demonstration, and practice over the past 20 years in special education and related disciplines have demonstrated that an effective educational system now and in the future must maintain high academic standards and clear performance goals for children with disabilities, consistent with the standards and expectations for all students in the educational system, and provide for appropriate and effective strategies and methods to ensure that students who are children with disabilities have maximum opportunities to achieve those standards and goals. [Section 651(a)(6)(A) of the Act.]

Accordingly, the evaluation and IEP provisions of Part B place great emphasis on the involvement and progress of children with disabilities in the general curriculum. (The term "general curriculum," as used in these regulations, including this Appendix, refers to the curriculum that is used with nondisabled children.)

While the Act and regulations recognize that IEP teams must make individualized decisions about the special education and related services, and supplementary aids and services, provided to each child with a disability, they are driven by IDEA's strong preference that, to the maximum extent appropriate, children with disabilities be educated in regular classes with their nondisabled peers with appropriate supplementary aids and services.

In many cases, children with disabilities will need appropriate supports in order to successfully progress in the general curriculum, participate in State and district-wide assessment programs, achieve the measurable goals in their IEPs, and be educated together with their nondisabled peers. Accordingly, the Act requires the IEP team to determine, and the public agency to provide, the accommodations, modifications, supports, and supplementary aids and services, needed by each child with a disability to successfully be involved in and progress in the general curriculum achieve the goals of the IEP, and successfully demonstrate his or her competencies in State and district-wide assessments.

1. What are the major Part B IEP requirements that govern the involvement and progress of children with disabilities in the general curriculum?

Present Levels of Educational Performance

Section 300.347(a)(1) requires that the IEP for each child with a disability include " * * * a statement of the child's present levels of educational performance, including – (i) *how the child's disability affects the child's involvement and progress in the general curriculum*; or (ii) *for preschool children, as appropriate, how the child's*

disability affects the child's participation in appropriate activities * * *" ("Appropriate activities" in this context refers to age-relevant developmental abilities or milestones that typically developing children of the same age would be performing or would have achieved.)

The IEP team's determination of how each child's disability affects the child's involvement and progress in the general curriculum is a primary consideration in the development of the child's IEP. In assessing children with disabilities, school districts may use a variety of assessment techniques to determine the extent to which these children can be involved and progress in the general curriculum, such as criterion-referenced tests, standard achievement tests, diagnostic tests, other tests, or any combination of the above.

The purpose of using these assessments is to determine the child's present levels of educational performance and areas of need arising from the child's disability so that approaches for ensuring the child's involvement and progress in the general curriculum and any needed adaptations or modifications to that curriculum can be identified.

Measurable Annual Goals, including Benchmarks or Short-term objectives

Measurable annual goals, including benchmarks or short-term objectives, are critical to the strategic planning process used to develop and implement the IEP for each child with a disability. Once the IEP team has developed measurable annual goals for a child, the team (1) can develop strategies that will be most effective in realizing those goals and (2) must develop either measurable, intermediate steps (short-term objectives) or major milestones

(benchmarks) that will enable parents, students, and educators to monitor progress during the year, and, if appropriate, to revise the IEP consistent with the student's instructional needs.

The strong emphasis in Part B on linking the educational program of children with disabilities to the general curriculum is reflected in § 300.347(a)(2), which requires that the IEP include:

A statement of measurable annual goals, including benchmarks or short-term objectives, related to – (i) *meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum*; and (ii) meeting each of the child's other educational needs that result from the child's disability.

As noted above, each annual goal must include either short-term objectives or benchmarks. The purpose of both is to enable a child's teacher(s), parents, and others involved in developing and implementing the child's IEP, to gauge, at intermediate times during the year, how well the child is progressing toward achievement of the annual goal. IEP teams may continue to develop short-term instructional objectives, that generally break the skills described in the annual goal down into discrete components. The revised statute and regulations also provide that, as an alternative, IEP teams may develop benchmarks, which can be thought of as describing the amount of progress the child is expected to make within specified segments of the year. Generally, benchmarks establish expected performance levels that allow for regular checks of progress that coincide with the reporting periods for informing parents of their child's progress

toward achieving the annual goals. An IEP team may use either short term objectives or benchmarks or a combination of the two depending on the nature of the annual goals and the needs of the child.

Special Education and Related Services and Supplementary Aids and Services

The requirements regarding services provided to address a child's present levels of educational performance and to make progress toward the identified goals reinforce the emphasis on progress in the general curriculum, as well as maximizing the extent to which children with disabilities are educated with nondisabled children. Section 300.347(a)(3) requires that the IEP include:

A statement of the special education and related services and supplementary aids and services to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child – (i) to advance appropriately toward attaining the annual goals; (ii) *to be involved and progress in the general curriculum* * * * and to participate in extracurricular and other nonacademic activities; and (iii) *to be educated and participate with other children with disabilities and nondisabled children in [extracurricular and other nonacademic activities]* * * * [Italics added.]

Extent to Which Child Will Participate With Nondisabled Children

Section 300.347(a)(4) requires that each child's IEP include "An explanation of the extent, if any, to which the child will not participate with nondisabled children in the

regular class and in [extracurricular and other nonacademic] activities * * *" This is consistent with the least restrictive environment (LRE) provisions at §§ 300.550-300.553, which include requirements that:

(1) Each child with a disability be educated with nondisabled children to the maximum extent appropriate (§ 300.550(b)(1));

(2) each child with a disability be removed from the regular educational environment only when the nature or severity of the child's disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (§ 300.550(b)(1)); and

(3) to the maximum extent appropriate to the child's needs, each child with a disability participates with nondisabled children in nonacademic and extracurricular services and activities (§ 300.553).

All services and educational placements under Part B must be individually determined in light of each child's unique abilities and needs, to reasonably promote the child's educational success. Placing children with disabilities in this manner should enable each disabled child to meet high expectations in the future.

Although Part B requires that a child with a disability not be removed from the regular educational environment if the child's education can be achieved satisfactorily in regular classes with the use of supplementary aids and services, Part B's LRE principle is intended to ensure that a child with a disability is served in a setting where the child can be educated successfully. Even though IDEA does not mandate regular class placement for every disabled

student, IDEA presumes that the first placement option considered for each disabled student by the student's placement team, which must include the parent, is the school the child would attend if not disabled, with appropriate supplementary aids and services to facilitate such placement. Thus, before a disabled child can be placed outside of the regular educational environment, the full range of supplementary aids and services that if provided would facilitate the student's placement in the regular classroom setting must be considered. Following that consideration, if a determination is made that particular disabled student cannot be educated satisfactorily in the regular educational environment, even with the provision of appropriate supplementary aids and services, that student then could be placed in a setting other than the regular classroom. Later, if it becomes apparent that the child's IEP can be carried out in a less restrictive setting, with the provision of appropriate supplementary aids and services, if needed, Part B would require that the child's placement be changed from the more restrictive setting to a less restrictive setting. In all cases, placement decisions must be individually determined on the basis of each child's abilities and needs, and not solely on factors such as category of disability, significance of disability, availability of special education and related services, configuration of the service delivery system, availability of space, or administrative convenience. Rather, each student's IEP forms the basis for the placement decision.

Further, a student need not fail in the regular classroom before another placement can be considered. Conversely, IDEA does not require that a student demonstrate achievement of a specific performance level as a prerequisite for placement into a regular classroom.

Participation in State or District-Wide Assessments of Student Achievement

Consistent with § 300.138(a), which sets forth a presumption that children with disabilities will be included in general State and district-wide assessment programs, and provided with appropriate accommodations if necessary, § 300.347(a)(5) requires that the IEP for each student with a disability include: "(i) a statement of any individual modifications in the administration of State or district-wide assessments of student achievement that are needed in order for the child to participate in the assessment; and (ii) if the IEP team determines that the child will not participate in a particular State or district-wide assessment of student achievement (or part of an assessment of student achievement), a statement of – (A) Why that assessment is not appropriate for the child; and (B) How the child will be assessed."

Regular Education Teacher Participation in the Development, Review, and Revision of IEPs

Very often, regular education teachers play a central role in the education of children with disabilities (H. Rep. No. 105-95, p. 103 (1997); S. Rep. No. 105-17, p. 23 (1997)) and have important expertise regarding the general curriculum and the general education environment. Further, with the emphasis on involvement and progress in the general curriculum added by the IDEA Amendments of 1997, regular education teachers have an increasingly critical role (together with special education and related services personnel) in implementing the program of FAPE for most children with disabilities, as described in their IEPs.

Accordingly, the IDEA Amendments of 1997 added a requirement that each child's IEP team must include at least one regular education teacher of the child, if the child is, or may be, participating in the regular education environment (see § 300.344(a)(2)). (See also §§ 300.346(d) on the role of a regular education teacher in the development, review and revision of IEPs.)

. . . .

23. For a child with a disability being considered for initial provision of special education and related services, which teacher or teachers should attend the IEP meeting?

A child's IEP team must include at least one of the child's regular education teachers (if the child is, or may be participating in the regular education environment) and at least one of the child's special education teachers, or, if appropriate, at least one of the child's special education providers (§ 300.344(a)(2) and (3)).

Each IEP must include a statement of the present levels of educational performance, including a statement of how the child's disability affects the child's involvement and progress in the general curriculum (§ 300.347(a)(1)). At least one regular education teacher is a required member of the IEP team of a child who is, or may be, participating in the regular educational environment, regardless of the extent of that participation.

The requirements of § 300.344(a)(3) can be met by either: (1) a special education teacher of the child; or (2) another special education provider of the child, such as a speech pathologist, physical or occupational therapist, etc., if the related service consists of specially designed instruction

and is considered special education under applicable State standards.

Sometimes more than one meeting is necessary in order to finalize a child's IEP. In this process, if the special education teacher or special education provider who will be working with the child is identified, it would be useful to have that teacher or provider participate in the meeting with the parents and other members of the IEP team in finalizing the IEP. If this is not possible, the public agency must ensure that the teacher or provider has access to the child's IEP as soon as possible after it is finalized and before beginning to work with the child.

Further, (consistent with § 300.342(b)), the public agency must ensure that each regular education teacher, special education teacher, related services provider and other service provider of an eligible child under this part (1) has access to the child's IEP, and (2) is informed of his or her specific responsibilities related to implementing the IEP, and of the specific accommodations, modifications, and supports that must be provided to the child in accordance with the IEP. This requirement is crucial to ensuring that each child receives FAPE in accordance with his or her IEP, and that the IEP is appropriately and effectively implemented.

24. What is the role of a regular education teacher in the development, review and revision of the IEP for a child who is, or may be, participating in the regular education environment?

As required by § 300.344(a)(2), the IEP team for a child with a disability must include at least one regular education teacher of the child if the child is, or may be, participating in the regular education environment.

Section 300.346(d) further specifies that the regular education teacher of a child with a disability, as a member of the IEP team, must, to the extent appropriate, participate in the development, review, and revision of the child's IEP, including assisting in – (1) the determination of appropriate positive behavioral interventions and strategies for the child; and (2) the determination of supplementary aids and services, program modifications, and supports for school personnel that will be provided for the child, consistent with 300.347(a)(3) (§ 300.344(d)).

Thus, while a regular education teacher must be a member of the IEP team if the child is, or may be, participating in the regular education environment, the teacher need not (depending upon the child's needs and the purpose of the specific IEP team meeting) be required to participate in all decisions made as part of the meeting or to be present throughout the entire meeting or attend every meeting. For example, the regular education teacher who is a member of the IEP team must participate in discussions and decisions about how to modify the general curriculum in the regular classroom to ensure the child's involvement and progress in the general curriculum and participation in the regular education environment.

Depending upon the specific circumstances, however, it may not be necessary for the regular education teacher to participate in discussions and decisions regarding, for example, the physical therapy needs of the child, if the teacher is not responsible for implementing that portion of the child's IEP.

In determining the extent of the regular education teacher's participation at IEP meetings, public agencies

and parents should discuss and try to reach agreement on whether the child's regular education teacher that is a member of the IEP team should be present at a particular IEP meeting and, if so, for what period of time. The extent to which it would be appropriate for the regular education teacher member of the IEP team to participate in IEP meetings must be decided on a case-by-case basis.

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64 Fed. Reg. 12,406 (Mar. 12, 1999) (to be codified at 34 C.F.R. Parts 300 and 303)

DEPARTMENT OF EDUCATION

Assistance to States for the Education of Children With Disabilities and the Early Intervention Program for Infants and Toddlers With Disabilities

SUMMARY: The Secretary issues final regulations for the Assistance to States for Education of Children with Disabilities program under Part B of the Individuals with Disabilities Education Act (IDEA; Part B) and the Early Intervention Program for Infants and Toddlers with Disabilities under Part C of the Act (Part C). These regulations are needed to implement changes made to Part B by the IDEA Amendments of 1997; make other changes to the part B regulations based on relevant, longstanding policy guidance; and revise the requirements on State complaint procedures under both the Part B and Part C programs.

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64 Fed. Reg. 12,440-41

Individualized Education Programs

§ 300.344 IEP team.

(a) *General.* The public agency shall ensure that the IEP team for each child with a disability includes –

(1) The parents of the child;

(2) At least one regular education teacher of the child (if the child is, or may be, participating in the regular education environment);

(3) At least one special education teacher of the child, or if appropriate, at least one special education provider of the child;

(4) A representative of the public agency who –

(i) Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;

(ii) Is knowledgeable about the general curriculum; and

(iii) Is knowledgeable about the availability of resources of the public agency;

(5) An individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in paragraphs (a)(2) through (6) of this section;

(6) At the discretion of the parent or the agency, other individuals who have knowledge or special expertise

regarding the child, including related services personnel as appropriate; and

(7) If appropriate, the child.

* * *

§ 300.346 Development, review, and revision of IEP.

* * *

(d) *Requirement with respect to regular education teacher.* The regular education teacher of a child with a disability, as a member of the IEP team, must, to the extent appropriate, participate in the development, review, and revision of the child's IEP, including assisting in the determination of –

(1) Appropriate positive behavioral interventions and strategies for the child; and

(2) Supplementary aids and services, program modifications or supports for school personnel that will be provided for the child, consistent with § 300.347(a)(3).

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64 Fed. Reg. 12,582-83

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IEP Team (§ 300.344)

Comment: Numerous commenters addressed the requirement in proposed § 300.344(a)(2) and the pertinent portions of the note regarding the role of the regular education teacher as a member of the child's IEP team if the child is, or may be, participating in the regular educational

environment. Some commenters were supportive of the participation of the regular education teacher at an IEP meeting, agreeing that at least one regular education teacher of the child should be an IEP team member. Some commenters also pointed out that problems surrounding placement of a child with a disability in the regular classroom cannot be addressed without adequate preparation or participation of teachers of those classes in the IEP meeting.

Those commenters opposed to the requirement cited potential costs. Some commenters also pointed out that, for children with disabilities taking a number of subjects, it will be impossible to bring all teachers together, while a single teacher will not have the requisite expertise on a variety of subjects.

Other commenters who were supportive of the regular education teacher's participation in principle, and acknowledged the importance of obtaining input from a regular education teacher, recommended a more flexible approach. These commenters felt that a requirement that a regular education teacher be present at every IEP meeting would interfere with the ability of regular education teachers to provide the necessary instruction to all children in their classrooms, both with and without disabilities. Specific recommendations that commenters made for regulatory changes were (1) the reference to regular educational environment in § 300.344(a)(2) should be replaced with language such as, if the child is, or may be, participating in a non-special education classroom; (2) the reference to regular education teacher should be replaced with general education teacher or person knowledgeable about the general education curriculum at the child's grade level; (3) the participation

of a regular education teacher is required only if issues arise regarding behavior or socialization, making the input necessary; and (4) a regular education teacher must attend if the child with a disability is, or may be, receiving instruction from a regular education teacher during the period of time covered by the proposed IEP.

Commenters made a number of other suggestions concerning which IEP meetings the regular education teacher needs to attend and how those determinations could be made, such as, (1) the regular education teacher must attend only the annual IEP review meeting, but that attendance at other meetings should be on an as-needed basis; (2) there should be no requirement that the regular education teacher be physically present at the IEP meeting, but must be given the opportunity to provide oral or written input about the child and appropriate instructional strategies; (3) the regular education teacher must attend to the extent appropriate; (4) the IEP team must consult with the regular education teacher to the extent appropriate, and determine whether it is necessary for the regular education teacher to attend all or part of the meeting; and (5) attendance is at the option of the regular education teacher, who also can appoint an individual of his or her choice who has had experience with the child and/or has had adequate pre-planning time with special education personnel.

Other commenters asked whether other individuals could be substituted for the regular education teacher's participation at IEP meetings, such as, (1) a special education teacher who is knowledgeable about the general curriculum; (2) a school counselor, particularly for high school students; (3) an individual certified as a regular education teacher, regardless of whether that individual is

currently working with the child; and (4) for children who are receiving only speech-language services, a regular education teacher need not participate.

Commenters also requested that the regulations be clarified to state that school officials will not be deemed to have predetermined placement solely because a regular education teacher is not present at an IEP meeting. In the event that a regular education teacher does not attend, commenters asked if that regular education teacher would be required to provide input regarding the regular curriculum, and, if so, how this would be accomplished and documented.

* * *

Discussion: Based on careful consideration of comments as well as applicable statutory requirements, § 300.344(a)(2) should be retained in these final regulations, but additional clarification should be provided in Appendix A and in § 300.342(b) of these regulations.

Section 614(d)(1)(B)(ii) of the Act specifies that the IEP team must include "at least one regular education teacher of such child (if the child is, or may be, participating in the regular education environment)." This statutory provision therefore prescribes that for any child who is, or may be participating in the regular educational environment, that child's regular education teacher must be a member of the child's IEP team. The child's regular education teacher's membership on the IEP team is particularly important to meeting the statutory requirement in section 614(d)(1)(A)(ii)(I) of the Act that the IEP explain how the child's needs will be met so that the child can be involved in and progress in the general curriculum.

In implementing the requirement for membership of a regular education teacher on the IEP team, the public agency will determine which teacher or teachers of the child will fulfill that function to ensure participation of at least one regular education teacher in the development, review, and revision, of the child's IEP, to the extent appropriate, in accordance with section 614(d)(3)(C) of the Act. (*See* discussion of § 300.346(d) of these regulations).

In addition, it would be highly beneficial to the education of children with disabilities to ensure that those regular education teachers and other service providers of the child who are not members of the child's IEP team are informed about the contents of a child's IEP to ensure that the IEP is appropriately implemented.

Whether the child's regular education teacher must be physically present at an IEP meeting, and to what extent that individual must participate in all phases of the IEP process, are matters that must (1) be determined on a case-by-case basis by the public agency, the parents, and other members of the IEP team, and (2) be based on a variety of factors. This issue is discussed in more detail in a question and answer contained in Appendix A to these final regulations. Since the statutory language is Incorporated into this regulation verbatim, no changes should be made regarding the use of the term "regular education teacher," or the statutory language regarding the regular educational environment.

It is important to point out that the statute specifies that at least one regular education teacher of the child is a member of the IEP team. Therefore, the suggestions of commenters that other individuals could participate in lieu of the child's regular education teacher as the regular

education teacher member of the child's IEP team should not be adopted; however, as stated in the note to this section in the NPRM, the regular education teacher participating in a child's IEP meeting should be the teacher who is, or may be, responsible for implementing the IEP, so that the teacher can participate in discussions about how best to teach the child.

If the child has more than one regular education teacher, the LEA may designate which teacher or teachers of the child will participate on the IEP team. While all regular education teachers of the child need not attend the child's IEP meeting, their input should be sought, regardless of whether they attend. In addition, each public agency must ensure that (1) the child's IEP is accessible to each regular education teacher (and to each special education teacher, related services provider and other service provider) who is responsible for its implementation, and (2) each of the child's teachers and providers is informed of his or her specific responsibilities related to implementing the child's IEP, and of the specific accommodations, modifications, and supports that must be provided to the child in accordance with the IEP. This provision is necessary to ensure proper implementation of the child's IEP and the provision of FAPE to the child. However, the mechanism that the public agency uses to inform each teacher or provider of his or her responsibilities is left to the discretion of the agency.

It is expected that the circumstances will be rare in which a regular education teacher would not be required to be a member of the child's IEP team. However, there may be situations in which a child is placed in a separate school and participates only in meals, recess periods,

transportation, and extracurricular activities with nondisabled children and is not otherwise participating in the regular educational environment, and no change in that degree of participation is anticipated during the next twelve months. In these instances, since there would be no current or anticipated regular education teacher for a child during the period of the IEP, it would not be necessary for a regular education teacher to be a member of the child's IEP team.

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64 Fed. Reg. 12,639

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With respect to paragraph (a)(1) of this section, nothing in the regulations would prohibit a public agency from allowing the group of persons that makes the placement decision to also serve as the child's IEP team, so long as all individuals described in § 300.344 are included. However, in the interest of limiting the use of notes in these regulations, Note 1 would be removed.

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APPENDIX G

105TH CONGRESS 1st Session
HOUSE OF REPRESENTATIVES
REPORT 105-95

INDIVIDUALS WITH DISABILITIES EDUCATION ACT AMENDMENTS OF 1997

MAY 13, 1997. – Committed to the
Committee of the Whole House on the
State of the Union and ordered to be printed

Mr. GOODLING, from the Committee on Education and the Workforce, submitted the following

REPORT

together with

ADDITIONAL AND DISSENTING VIEWS

[To accompany H.R. 5]

[Including cost estimate of
the Congressional Budget Office]

. . . .

TITLE I – AMENDMENTS TO THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

Amendments to part A of the Individuals with Disabilities Education Act

. . . .

Evaluations, eligibility determinations, IEPs and placements section 614

The bill consolidates in section 614 all interrelated provisions regarding the evaluation and reevaluation of children with disabilities and the development, review, and revision of individualized education programs (IEPs) for these children. Most of these provisions are current law, as it is expressed in statute, regulations, and other regulatory guidance and policies from the U.S. Department of Education. The Committee anticipates that the consolidation of these provisions in one section, and the clarification of procedural and administrative requirements associated with them, will reduce the burdens imposed by the interpretations of current law and make the requirements more understandable. The Committee expects that these particular amendments will facilitate State and local implementation of, and compliance with, these provisions.

Provisions on evaluation in section 614 codify the requirement that a full and individual initial comprehensive evaluation must be conducted before the provision of special education and related services; that the purposes of the initial evaluation are to determine whether a child is a child with a disability, and to determine the child's specific educational needs. The bill specifies that parents must provide informed consent before the initial evaluation of a child, but that such consent shall not be construed as consent for placement for the receipt of special education and related services. If a child's parents refuse consent for evaluation, an LEA may continue to pursue an evaluation by using the mediation and due process procedures under section 615, except to the extent inconsistent with State law relating to parental consent.

Reevaluations are to be conducted if conditions warrant a reevaluation or if the child's parents or teacher

requests a reevaluation, but at least once every three years. Informed parental consent also must be obtained for reevaluations, except that such informed consent need not be obtained if the LEA can demonstrate that it has taken reasonable steps to obtain consent and the child's parents have failed to respond.

The bill requires that, in conducting evaluations, the LEA: (1) use a variety of assessment tools and strategies to gather relevant functional and developmental information, including information from the child's parents, to establish the child's eligibility and to determine the content of the child's IEP, including information relating to enabling the child to be involved in and progress in the general education curriculum; (2) not use any single procedure as the sole criterion for determining a child's eligibility or for determining an appropriate educational program for the child; and (3) use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

In addition, the bill requires an LEA to ensure that: (1) tests and other evaluation materials used to assess a child are selected and administered so as not to be racially or culturally discriminatory, and are administered in the child's native language or other mode of communication, unless it is clearly not feasible to do so; (2) any standardized tests given to the child have been validated for the specific purpose for which they are used; are administered by trained and knowledgeable personnel; and are administered in accordance with the instructions provided by the producers of such tests; (3) the child is assessed in all areas of suspected disability; and (4) assessment tools and strategies provide relevant information that directly

assists persons in determining the educational needs of the child. These requirements reflect current policy contained in current law and regulations, but now for the first time, the bill codifies them in one section of statute.

The Committee intends that professionals, who are involved in the evaluation of a child, give serious consideration at the conclusion of the evaluation process to other factors that might be affecting a child's performance. There are substantial numbers of children who are likely to be identified as disabled because they have not previously received proper academic support. Such a child often is identified as learning disabled, because the child has not been taught, in an appropriate or effective manner for the child, the core skill of reading. Other cases might include children who have limited English proficiency. Therefore, in making the determination of a child's eligibility, the bill states that a child shall not be determined to be a child with a disability if the determinant factor for such a determination is lack of instruction in reading or math or limited English proficiency. The Committee believes this provision will lead to fewer children being improperly included in special education programs where their actual educational difficulties stem from another cause and that this will lead schools to focus greater attention on these subjects in the early grades.

The bill specifies that the determination of a child's eligibility is to be made by a qualified team of professionals and the child's parents. The bill requires that a copy of the evaluation report and the documentation of the child's eligibility determination be given to the child's parents.

One of the most significant changes in the bill relates to how the evaluation process should be viewed. For

example, over the years, the required three year reevaluation has become a highly paperwork-intensive process, driven as much by concern for compliance with the letter of the law, as by the need for additional evaluation information about a child. The Committee believes that a child should not be subjected to unnecessary tests and assessments if the child's disability has not changed over the three-year time period, and the LEA should not be saddled with associated expenses unnecessarily. If there is no need to collect additional information about a child's continuing eligibility for special education, any necessary evaluation activities should focus on collecting information about how to teach and assist the child in the way he or she is most capable of learning.

Thus, provisions in the bill require that existing evaluation data on a child be reviewed to determine if any other data are needed to make decisions about a child's eligibility and services. If it is determined by the IEP Team and other qualified professionals that additional data are not needed, the parents must be so notified of the determination that no additional data are needed, the reasons for it, and of the parents' right to still request an evaluation. Unlike current law, however, no further evaluations will be required at that time unless requested by the parents.

To assist in improved compliance with the IEP provisions, the Committee placed all provisions pertaining to the IEP, including the definitions of the IEP and the IEP Team, in section 614(d). The definition of the Individualized Education Program (IEP) includes all of the required elements of an IEP, beginning with a statement of a child's present levels of educational performance, including how the child's disability affects the child's involvement and

progress in the general education curriculum, or for a preschool child with a disability, how the child's disability affects the child's participation in appropriate activities. The IEP should also address the unique needs of the child that arise out of their disability that must be addressed in order for the child to progress in the general education curriculum, such as the need of a blind child to read Braille, or of a cognitively-disabled child to receive transportation training (i.e., how to use public transportation). The Committee wishes to emphasize that, once a child has been identified as being eligible for special education, the connection between special education and related services and the child's opportunity to experience and benefit from the general education curriculum should be strengthened. The majority of children identified as eligible for special education and related services are capable of participating in the general education curriculum to varying degrees with some adaptations and modifications. This provision is intended to ensure that children's special education and related services are in addition to and are affected by the general education curriculum, not separate from it.

The new emphasis on participation in the general education curriculum is not intended by the Committee to result in major expansions in the size of the IEP of dozens of pages of detailed goals and benchmarks or objectives in every curricular content standard or skill. The new focus is intended to produce attention to the accommodations and adjustments necessary for disabled children to access the general education curriculum and the special services which may be necessary for appropriate participation in particular areas of the curriculum due to the nature of the disability.

Specific day to day adjustments in instructional methods and approaches that are made by either a regular or special education teacher to assist a disabled child to achieve his or her annual goals would not normally require action by the child's IEP Team. However, if changes are contemplated in the child's measurable annual goals, benchmarks, or short term objectives, or in any of the services or program modifications, or other components described in the child's IEP, the LEA must ensure that the child's IEP Team is reconvened in a timely manner to address those changes.

The bill requires that a child's IEP include a statement of measurable annual goals, including benchmarks or short-term objectives. The Committee views this requirement as crucial. It will help parents and educators determine if the goals can reasonably be met during the year, and as important, allow parents to be able to monitor their child's progress. The bill requires that annual goals included in a child's IEP relate to "meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general education curriculum." This language should not be construed to be a basis for excluding a child with a disability who is unable to learn at the same level or rate as nondisabled children in an inclusive classroom or program. It is intended to require that the IEP's annual goals focus on how the child's needs resulting from his or her disability can be addressed so that the child can participate, at the individually appropriate level, in the general curriculum offered to all students.

Prior to the enactment of P.L. 94-142 in 1975, the opportunity and inclination to educate children with disabilities was often in separate programs and schools

away from children without disabilities. The law and this bill contain a presumption that children with disabilities are to be educated in regular classes. Therefore, the legislation requires that the IEP include an explanation of the extent, if any, to which a child with a disability will not participate with nondisabled children in the regular class and in the general education curriculum including extra-curricular and non-academic activities.

This Committee recognizes that every decision made for a child with a disability must be made on the basis of what that individual child needs. Every child is unique and so will be his or her program needs. Nonetheless, when the decision is made to educate the child separately, an explanation of that decision will need, at a minimum, to be stated as part of the child's IEP.

Children with disabilities must be included in State and districtwide assessments of student progress with individual modifications and accommodations as needed. Thus, the bill requires that the IEP include a statement of any individual modifications in the administration of State and districtwide assessments. The Committee knows that excluding children with disabilities from these assessments severely limits and in some cases prevents children with disabilities, through no fault of their own, from continuing on to postsecondary education. The bill requires that if the IEP team determines that the child's performance cannot appropriately be assessed with the regular education assessments, even with individual modifications, the IEP must include a statement of why the assessment is not appropriate and alternative assessments must be made available. The Committee reaffirms the existing Federal law requirement that children with disabilities participate in State and district-wide assessments. This will assist

parents in judging if their child is improving with regard to his or her academic achievement, just as the parents of nondisabled children do.

As under current law, a child's IEP must include a statement of the special education and related services and supplementary aids and services to be provided to the child, or on behalf of the child. The Committee intends that, while teaching and related services methodologies or approaches are an appropriate topic for discussion and consideration by the IEP Team during IEP development or annual review, they are not expected to be written into the IEP. Furthermore, the Committee does not intend that changing particular methods or approaches necessitates an additional meeting of the IEP Team. Additionally, the Committee is aware of, and endorses, the provision in Section 300.350 of the current regulations relating to personal accountability. That regulation provides that each public agency must provide special education and related services to a child with a disability in accordance with an IEP. However, part B does not require that any agency, teacher, or other person be held accountable if a child does not achieve the growth projected in the annual goals and objectives.

The location where special education and related services will be provided to a child influences decisions about the nature and amount of these services and when they should be provided to a child. For example, the appropriate place for the related service may be the regular classroom, so that the child does not have to choose between a needed service and the regular educational program. For this reason, in the bill the Committee has added "location" to the provision in the IEP that includes "the projected date for the beginning of services

and modifications, and the anticipated frequency, location, and duration of those services."

The bill requires that the IEP include, beginning at age fourteen, "a statement of the transition service needs of the child under the applicable components of the child's IEP that focuses on the child's courses of study (such as participation in advanced placement courses or a vocational education program)". The purpose of this requirement is to focus attention on how the child's educational program can be planned to help the child make a successful transition to his or her goals for life after secondary school. This provision is designed to augment, and not replace, the separate transition services requirement, under which children with disabilities beginning no later than age sixteen receive transition services including instruction, community experiences, the development of employment and other post-school objectives and, when appropriate, independent living skills and functional vocational evaluation. For example, for a child whose transition goal is a job, a transition service could be teaching the child how to get to the job site on public transportation.

Current law is not clear on what is required when a child with a disability attains the age of majority. In order to clarify the situation, the IEP definition in the bill includes a statement that the child has been informed of his or her rights under part B, if any, that will transfer to the child when he or she attains the age of majority. The bill clarifies that when a child is considered incapable of making educational decisions, the State will develop procedures for appointing the parent or another individual to represent the interests of the child. This transfer of rights is also addressed under section 615(m) in the bill.

Additionally, the bill requires that a child's IEP include a statement of how the child's progress toward the annual goals will be measured and how the child's parents will be regularly informed of the child's progress toward those goals (by such means as report cards) as often as parents are informed of their nondisabled children's progress. The Committee believes that informing parents of children with disabilities as often as other parents will, in fact, reduce the cost of informing parents of children with disabilities and facilitate more useful feedback on their child's performance. One method recommended by the Committee would be by providing an IEP report card with the general education report card, if the latter is appropriate and provided for the child.

An IEP report card could also be made more useful by including checkboxes or equivalent options that enable the parents and the special educator to review and judge the performance of the child.

An example would be to state a goal or benchmark on the IEP report card and rank it on a multi-point continuum. The goal might be, "Ted will demonstrate effective literal comprehension." The ranking system would then state the following, as indicated by a checkbox: No progress; some progress; good progress; almost complete; completed. Of course, these concepts would be used by the school and the IEP Team when appropriate. This example is not intended to indicate the Committee's preference for a single means of compliance with this requirement.

The bill's definition of the Individualized Education Program (IEP) includes the parents of a child with a disability; at least one regular education teacher of such child (if the child is, or may be, participating in the regular

education environment); at least one special education teacher, or where appropriate, at least one special education provider of such child; a representative of the local educational agency who is (a) qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities; (b) knowledgeable about the general curriculum; and (c) knowledgeable about the availability of resources of the local educational agency; an individual who can interpret the instructional implications of evaluation results, who may be a member of the team; at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and whenever appropriate, the child with a disability. Very often, regular education teachers play a central role in the education of children with disabilities. In that regard the bill provides that regular education teacher participate on the IEP Team, but this provision is to be construed in light of the bill's proviso that the regular education teacher, to the extent appropriate, participate in the development of the IEP of the child. The Committee recognizes the reasonable concern that the provision including the regular education teacher might create an obligation that the teacher participate in all aspects of the IEP Team's work. The Committee does not intend that to be the case and only intends it to be to the extent appropriate. The Committee wishes to emphasize that the "support" for school personnel, that is stated in the child's IEP is that support that will assist them to help a particular child progress in the general education curriculum.

Related services personnel should be included on the team when a particular related service will be discussed at

the request of a child's parents or the school. Such personnel can include personnel knowledgeable about services that are not strictly special education services, such as specialists in curriculum content areas such as reading. Furthermore, the Committee recognizes that there are situations that merit the presence of a licensed registered school nurse on the IEP Team. The Committee also recognizes that schools sometimes are assumed to be responsible for all health-care costs connected to a child's participation in school. The Committee wishes to encourage, to the greatest extent practicable and when appropriate, the participation of a licensed registered school nurse on the IEP Team to help define and make decisions about how to safely address a child's educationally-related health needs.

The bill also clarifies obligations in two areas. First, nothing in section 614 may be construed to require the IEP Team to include information under one component of a child's IEP that is already contained in another component. Second, section 614 requires that each LEA or State educational agency ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child. The Committee expects that the majority of placement decisions will be made by the IEP Team, but in those unique cases where it is not, the Committee expects parents to be involved in the group making the decision.

The bill requires that, at the beginning of every school year, an IEP be in effect for each child with a disability served by an LEA, a State agency, or an SEA. In the case of a child with a disability aged 3 though 5 (or at the discretion of the State educational agency, a 2 year-old child with a disability who will turn age 3 during the

school year), an individualized family service plan that contains the requirements described in section 636, and that is developed in accordance with section 614, may serve as the child's IEP if using that plan as the IEP is consistent with State policy and agreed to by the agency and the child's parents.

The bill specifies that the LEA shall ensure that a child's IEP Team review a child's IEP periodically, but not less than annually to determine whether the annual goals of the child are being achieved; and revises the IEP as appropriate to address: (1) any lack of expected progress toward the annual goals and in the general education curriculum, where appropriate; (2) the results of any reevaluation; (3) information provided by or to the parents; (4) the child's anticipated needs; or (5) other matters.

With regard to transition services in IEPs, the bill provides that if an agency, other than the LEA, participating in the child's education fails to provide the transition services described in the child's IEP, the LEA must reconvene the IEP Team to identify alternative strategies to meet the child's transition objectives.

In developing a child's IEP, the bill requires that the IEP Team consider the strengths of the child and the concerns of the parents for enhancing the education of their child; and the results of the initial evaluation or most recent evaluation of the child. In addition, the Committee believes that a number of considerations are essential to the process of creating a child's IEP. The purpose of the IEP is to tailor the education to the child; not tailor the child to the education. If the child could fit into the school's general education program without assistance, special education would not be necessary.

The bill provides that, in the case of a child whose behavior impedes the learning of the child or others, the IEP Team, as appropriate, shall consider strategies, including positive behavior interventions strategies and supports, to address that behavior. Similarly, in the case of a child with limited English proficiency, the IEP Team is to consider the language needs of the child as such needs relate to the child's IEP. In the case of a child who is blind or visually impaired, the IEP team must provide for instruction in Braille and the use of Braille unless the IEP team determines, after an evaluation of the child's reading and writing skills, needs, and appropriate reading and writing media (including an evaluation of the child's future needs for instruction in Braille or the use of Braille), that instruction in Braille or the use of Braille is not appropriate for the child.

The Team also is to consider the communication needs of the child in order to ensure that local educational agencies better understand the unique needs of children who are deaf or hard of hearing; section 614(d)(3)(B)(iv) includes special factors that must be considered in developing IEPs for these children. The policy included in the bill provides that, in the case of the child who is deaf or hard of hearing, the IEP Team must consider the language and communication needs of the child; opportunities for direct communication with peers and professional personnel in the child's language and communication mode; the child's academic level; and the child's full range of needs, including the child's social, emotional, and cultural needs and opportunities for direct instruction in the child's language and communication mode. The Committee also intends that this provision will be implemented in a manner consistent with the Policy guidance entitled "Deaf

Students Education Services," published in the Federal Register (57 Fed. Reg. 49274, October 30, 1992) by the U.S. Department of Education.

The bill further requires that the IEP Team consider the provision of assistive technology devices and services when developing the child's IEP.

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APPENDIX H

WASHINGTON ADMINISTRATIVE CODE

TITLE 392 – PUBLIC INSTRUCTION, SUPERINTENDENT OF CHAPTER 392-172 – RULES FOR THE PROVISION OF SPECIAL EDUCATION TO SPECIAL EDUCATION STUDENTS

Service Delivery Options

. . . .

WAC 392-172-180 Procedures for establishing educational placement. (1) The educational placement of each special education student, including a preschool student, shall be determined at least annually at a meeting conducted pursuant to WAC 392-172-15700 and 392-172-15705.

(2) The selection of the appropriate placement for each special education student shall be based upon:

(a) The student's individualized education program;

(b) The least restrictive environment requirements of WAC 392-172-172;

(c) The placement option(s) that provides a reasonably high probability of assisting the student to attain his or her annual goals; and

(d) A consideration of any potential harmful effect on the student or on the quality of services which he or she needs.

(3) Unless the IEP of a special education student requires some other arrangement, the student shall be educated in the school that he or she would attend if

nondisabled. The placement shall be as close as possible to the student's home, unless the parents otherwise agree.

(4) The decision on the educational placement shall be made by a group of persons, including the parents, and other persons knowledgeable about the student, the evaluation data, and the placement options.

(5) A special education student is not removed from education in age-appropriate general classrooms solely because of needed modifications in the general curriculum.

(6) Notwithstanding subsections (1) through (5) of this section, an IEP team, or other team making placement decisions for a student convicted as an adult and receiving educational services under chapter 28A.193 RCW, may modify the student's placement if there is a demonstrated bona fide security or compelling penological interest that cannot otherwise be accommodated.